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v. 7810

No. 13503

United States
Court of Appeals
for the Ninth Circuit

GIULIO PARTICELLI, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ESTATE OF ELETTA PARTICELLI, Deceased, and ARTHUR GUERRAZZI, Executor, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 312, inclusive)

Petitions to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13503

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for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Petitioner:

GEORGE E. OEFINGER, C.P.A.
HARRISON H. SIMPSON, Esq.,
VALENTINE BROOKES, Esq.

For Respondent:

LEONARD ALLEN MARCUSSEN, Esq.,
R. C. WHITLEY, Esq.

The Tax Court of the United States

Docket No. 25,439

GIULIO PARTICELLI,

Petitioner,

vs.

COMMISSIONER OR INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols: San Francisco Division, IRA:90-D : DRU (C-TS : PD : SF : WGW)) dated July 21, 1949, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with his principal residence at 1350 Francisco Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on July 21, 1949.

3. The petitioner is the same person as is addressed as "Guilio Particelli" in said notice of deficiency.

4. The taxes in controversy are individual income and victory taxes for the calendar year 1943 in the amount of $62,222.85.

5. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in reducing the deduction allowable for depreciation on business assets in which petitioner had a community property interest to an amount less than $3,012.25 for the calendar year 1942 and to an amount less than $4,904.50 for the calendar year 1943.

(b) The Commissioner erred in determining that of the total consideration of $350,000.00 received during the calendar year 1943 for wine, winery and equipment, in which the petitioner had a community property interest:

(1) An amount less than $273,000.00 should be allocated to the winery and equipment, and

(2) An amount more than $77,000.00 should be allocated to the wine.

(c) The Commissioner erred in determining that the tax basis of said winery and equipment was an amount less than $55,366.00.

(d) The Commissioner erred in reducing the deduction allowable for amounts expended by petitioner from community property funds during the calendar year 1943 for the purchase of grapes to an amount less than $117,618.73.

(e) The Commissioner erred in reducing the deduction allowable for compensation paid by petitioner from community property funds during the calendar year 1943 for the services of one Arthur Guerrazzi to an amount less than $5,600.00.

(f) The Commissioner erred in reducing the deduction allowable for compensation paid by petitioner from community property funds during the calendar year 1943 for the services of one Clotilde Guerrazzi to an amount less than $5,600.00.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

Error (a)—Depreciation on business assets:

1. The dates of acquisition, the adjusted basis as at January 1, 1942, and the reasonable allowance for depreciation on business assets in which petitioner had a community property interest during the calendar years 1942 and 1943 are as follows:

Particulars	Date Acquired	Cost	Rate	1942	1943	Prior Years
WINERY IN FORESTVILLE:						
Land—2 acres and fill	1940	$ 900.00		$	$	$....
Winery building "A" concrete	1941	12,000.00	3%	360.00	360.00	180.00
Winery building "B" wood	1942	7,000.00	4	140.00	280.00	....
Winery building "C" wood	1943	7,000.00	4	....	140.00	....
Scales and office building—wood	1942	1,500.00	5	37.50	75.00	....
Tanks (323,504 gals.)—wood	1941-43	12,940.00	5	211.00	647.00	211.00
Crusher, conveyor and motor	1943	2,500.00	5	....	250.00	....
Presses	1941-43	3,000.00	10	200.00	300.00	100.00
Boiler—oil	1941	1,500.00	10	150.00	150.00	75.00
Pumps (3)	1941-42-43	1,500.00	10	75.00	125.00	25.00
Filters (2)	1942-42	1,500.00	15	75.00	225.00	....
Inside conveyors and motors	1943	1,700.00	10	....	170.00	....
Pipe lines and valves	1941-42-43	1,250.00	10	75.00	125.00	25.00
Brass faucets, fittings and winery tools	1941-42-43	1,500.00	10	75.00	125.00	25.00
Pump house and well	1941	2,000.00	5	100.00	100.00	50.00
Fence around winery	1941	500.00	10	50.00	50.00	25.00
Cement mixer	1943	125.00	20	....	25.00	....
Grape boxes—400 old						
Grape boxes—3500 new	1942-43	1,750.00	10	87.50	175.00	....
Wine hose	1941-42-43	1,000.00	10	50.00	50.00	25.00
		$61,165.00		$1,686.00	$3,372.00	$741.00

Particulars	Date Acquired	Cost	Rate	1942	1943	Prior Years
FARMING PROPERTIES, ETC:						
Building in Forestville	8-26-37	$ 3,600.00	5%	$ 180.00	$ 180.00	$ 720.00
Improvements	1937	1,500.00	5	75.00	75.00	300.00
Fixtures and office equipment	1936-39	750.00	10	75.00	75.00	225.00
Filling machine, washing machine, tools and bottle corker	1937-39	750.00	10	75.00	75.00	225.00
Ranch properties:						
Residence	1931	6,000.00	....	....	....	....
Garage — Double A	1931	500.00	5	25.00	25.00	250.00
Cottage — 2 rooms	1940	500.00	5	25.00	25.00	25.00
Pump house and well	1925	1,000.00	5	50.00	50.00	800.00
Garage and woodshed B	1933	1,000.00	5	50.00	50.00	400.00
Barn	1925	500.00	5	25.00	25.00	400.00
Chicken house	1930	200.00	5	10.00	10.00	110.00
Farm implements, plows, cutivators, harrows, etc.	1939-43	500.00	12½	31.25	62.50	93.75
Grape vines — 30 acres	1925-40	6,000.00	3	180.00	180.00	1,440.00
Well	1943	400.00	10	....	20.00	....
Fence posts	1943	400.00	20	....	40.00	....
G.M. Co. truck	1940	1,500.00	20	300.00	300.00	450.00
Chevrolet	1938	1,000.00	20	200.00	100.00	700.00
Chevrolet pickup	Nov. 1942	950.00	20	....	190.00	....
Horses (3)	1939-43	500.00	10	25.00	50.00	75.00
		$27,550.00		$1,326.25	$1,532.50	$6,213.75
		$88,715.00		$3,012.25	$4,904.50	$6,954.75

2. All of said business assets which are described as "Winery in Forestville" were used exclusively for business purposes from the dates of acquisition to the date said winery was sold.

3. All of said business assets which are described as "Farming Properties, Etc.," were used exclusively for business purposes from the dates of acquisition to December 31, 1943.

Error (b)—Allocation of consideration received on sale of wine, winery and equipment:

1. On or about December 6, 1943, petitioner as seller entered into an "Agreement of Sale" in which he agreed to sell and one John Dumbra agreed to buy "All that certain winery known as Lucca Winery located at Forestville, Sonoma County, California, together with two acres more or less of land on which said winery is located, all buildings now located thereon, all fixtures, equipment, supplies (other than wine), goodwill, trade names, formulas, and all other personal property of every kind and description now belonging to or a part of said Lucca Winery, for the total sum of $273,000.00."

2. In a separate paragraph in said agreement of sale it was further understood and agreed that petitioner would sell and the said John Dumbra would buy "275,000 gallons of wine now in storage in said Lucca Winery at the total price of $77,000.00."

3. Said agreement of sale was executed in accordance with its terms prior to December 31, 1943.

4. The consideration of $77,000.00 paid for the 275,000 gallons of wine included in said agreement of sale was the maximum price at which said wine

could be sold at the date of the agreement without violating the regulations of the Office of Price Administration covering the sale of bulk wines.

Error (c)—Tax basis of winery and equipment:

1. The adjusted basis for determining gain or loss from said sale of winery, land, buildings, fixtures, equipment, supplies (other than wine), goodwill, trade names, formulas, and all other personal property of every kind and description belonging to or a part of said Lucca Winery was an amount not less than $55,366.00.

Error (d)—Decrease in cost of grapes purchased:

1. During the calendar year 1943 petitioner expended from community property funds the total amount of $117,618.73 for the purchase of grapes.

2. All of said grapes were purchased and used by petitioner in the production of wine for sale to customers in the ordinary course of his business.

Error (e)—Compensation paid Arthur Guerrazzi:

1. During the calendar year 1943, petitioner paid one Arthur Guerrazzi from community property funds the amount of $5,600.00 solely as compensation for services rendered in the conduct of petitioner's business.

2. Said Arthur Guerrazzi was employed as a full-time salesman.

3. Said $5,600.00 did not exceed the reasonable value of the services of the said Arthur Guerrazzi to the petitioner for the calendar year 1943.

Error (f)—Compensation paid Clotilde Guerrazzi:

1. During the calendar year 1943, petitioner paid one Clotilde Guerrazzi from community property funds the amount of $5,600.00 solely as compensation for services rendered in the conduct of petitioner's business.

2. Said Clotilde Guerrazzi was a full-time employee engaged in the operation of petitioner's retail liquor store in Forestville, California; in bottling wine for sale; in keeping records; and in performing miscellaneous other activities connected with the business.

3. Said $5,600.00 did not exceed the reasonable value of the services of the said Clotilde Guerrazzi to the petitioner for the calendar year 1943.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that no deficiency in income and victory taxes is due from this petitioner for the calendar year 1943.

/s/ GEORGE E. OEFINGER, C.P.A.,
/s/ HARRISON H. SIMPSON,
Counsel for Petitioner

State of California,
County of Sonoma—ss.

H. L. Hotle, being duly sworn, says that he is attorney-in-fact for the petitioner above-named; that the petitioner has been outside the United States at all times since July 21, 1949, the date of the Commissioner's notice of deficiency; that affiant is authorized under his power of attorney from petitioner (a copy of which is attached and marked Ex-

hibit B) to execute this petition for the petitioner; that affiant has read the foregoing petition and is familiar with the statements contained therein; and that to the best of his knowledge and belief such statements are true.

/s/ H. L. HOTLE,
as Attorney-in-fact for Guilio Particelli

Subscribed and sworn to before me this 6th day of October, 1949.

[Seal] /s/ S. K. McMULLIN,
Notary Public

EXHIBIT A

Form 1279 (Rev. Mar. 1946) SN-IT-7

Treasury Department
Internal Revenue Service

74 New Montgomery St., San Francisco 5, Calif.
Office of Internal Revenue Agent in Charge
San Francisco Division.
IRA:90-D:DRU (C:TS:PD SF:WGW)

Mr. Guilio Particelli
1350 Francisco St., San Francisco, Calif.

Dear Mr. Particelli:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of $62,222.85, as shown in the statement attached.

In accordance with the provisions of existing in-

Exhibit A—(Continued)

ternal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D.C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return (x) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner

/s/ By F. M. HARLESS,
Internal Revenue Agent in
Charge

Enclosures: Statement, Form 1276, Form of Waiver, Exhibit A.

Exhibit A—(Continued)

Statement

Tax Liability for the Taxable Year Ended December 31, 1943:

	Deficiency
Income and victory tax	$62,222.85

In making this determination of your tax liability, careful consideration has been given to your protest filed August 31, 1948 and to the statements made at the conferences held on October 5, 1948 and May 27, 1949.

A copy of this letter and statement has been mailed to your representative, Mr. George E. Oefinger, c/o Arthur Andersen & Co., 1722 Russ Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME
Year 1942

Net income as disclosed by return (joint return)	$3,410.50
Nontaxable income and additional deductions:	
(a) Business income	519.95
Net income as adjusted	$2,890.55

EXPLANATIONS OF ADJUSTMENTS

(a) Business income is decreased by $519.95 due to the following adjustments:

Decrease:

(1) Depreciation allowed	$1,720.00

Exhibit A—(Continued)

Increase:		
(2) Truck purchase payments disallowed	$920.00	
(3) Bad debt deduction disallowed	280.05	1,200.05
Net decrease		$ 519.95

(1) You claimed no depreciation on your return for 1942. You now contend that the allowable depreciation for 1942 should be $3,012.25, divisible equally with your spouse. The amount allowable as a deduction for depreciation for 1942 has been found to be $1,720.00, divisible equally with your spouse. (Exhibit A attached hereto.)

(2) You deducted the amount of $920.00 representing payments made on new trucks. The deduction is disallowed for the reason that such payments constitute a capital expenditure, cost of which is recoverable through depreciation.

(3) Bad debt deduction in the amount of $280.05 is disallowed since your books are maintained on the cash basis and the sales from which the debts arose were never reported as income.

COMPUTATION OF TAX—Year 1942

Net income (joint return)	$2,890.55
Less: Personal exemption	1,200.00
Balance (surtax net income)	$1,690.55
Less: Earned income credit (10% of $2,890.55)	289.06
Net income subject to normal tax	$1,401.49
Normal tax at 6% on $1,401.49	$ 84.09
Surtax on $1,690.55	219.77
Total tentative income tax liability	$ 303.86
Your one-half share	$ 151.93

ADJUSTMENTS TO NET INCOME—Year 1943

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return	$ 53,198.88	$(1,209.62
Unallowable deductions and additional income:		
(a) Business income	121,105.75	121,105.75
Total	$174,304.63	$119,896.13

Exhibit A—(Continued)

Nontaxable income and additional deductions:

(b) Net capital gain	$49,138.50		$0.00	
(c) Contributions	153.50	49,292.00	0.00	0.00
Net income as adjusted		$125,012.61		$119,896.13

EXPLANATIONS OF ADJUSTMENTS

(a) Your income from business has been increased as follows:

(1) Depreciation disallowed	$ 2,384.50
(2) Wine sales increased	225,500.00
(3) Grape cost decreased	7,020.00
(4) Labor costs decreased	7,000.00
(5) Contributions	307.00
Total	$242,211.50
One-half applicable to each spouse	$121,105.75

(1) You claimed depreciation on your return for 1943 in the amount of $4,904.50. The amount allowable as a deduction for depreciation for 1943 has been found to be $2,520.00. (Exhibit A attached hereto.)

(2) In the year 1940 you acquired certain land and in the years 1941 to 1943 constructed thereon a winery and acquired winery equipment at a cost of approximately $30,500. In December 1943 you sold said winery and 275,000 gallons of wine for the sum of $350,000. You allocated $77,000 of the sale price to the wine and $273,000 to the winery and equipment. You claimed a cost basis of $55,366 for the winery and equipment and reported a gain from the sale of capital assets in the amount of $217,634. It is held that a fair allocation of the sale price of $350,000 requires that $302,500 be attributed to the wine and $47,500 to the winery and equipment. As a consequence the selling price of the wine has been increased in the amount of $225,500.

(3) Information at hand discloses that you overstated the cost of

Exhibit A—(Continued)

grapes purchased in the amount of $3,510 and included as a buying commission the additional amount of $3,510. You have stated that you performed your own buying. There is no proof of payment of $3,510 described as buying commission. The amount of $7,020 is excluded from your costs.

(4) A payment of $10,000 was made to your daughter and her husband which you claimed as a deduction in 1943 and included in labor costs. You state that the above-mentioned amount was in addition to $600 paid to each of them in 1943. It is held that $3,000 of the above-mentioned amount of $10,000 is deductible as additional compensation paid to your daughter and the remainder, namely, $7,000, is not an allowable deduction.

(5) Contributions claimed by you as business expense should be claimed under Section 23(1), Internal Revenue Code.

(b) The gain reported by you from the sale of your winery is adjusted as follows:

	As returned	As determined herein
Amount allocated to sale price of winery	$273,000.00	$47,500.00
Cost of property sold (less depreciation)	55,366.00	26,420.00
Capital gain (brought forward)	$217,634.00	$21,080.00
Gain or loss to be taken into account—50% (assets held more than six months)	108,817.00	10,540.00
One-half applicable to each spouse	$ 54,408.50	$ 5,270.00
Reduction in capital gain		$49,138.50

(c) Deduction of $153.50 for contributions is allowed herein representing your community one-half share of total contributions of $207.00 which were disallowed as a business expense in item (a) (5) above.

Exhibit A—(Continued)

COMPUTATION OF ALTERNATIVE TAX
Year 1943

Net income	$125,012.63
Less: Net long-term capital gain	5,270.00
Ordinary net income	$119,742.63
Less: Personal exemption	600.00
Surtax net income	$119,142.63
Less: Earned income credit	1,400.00
Income subject to normal tax	$117,742.63
Normal tax at 6% on $117,742.63	$ 7,064.56
Surtax on $119,142.63	74,262.68
Partial tax	$ 81,327.24
Add: 50% of excess of net long-term capital gain over net short-term capital loss	2,635.00
Alternative tax	$ 83,962.24

COMPUTATION OF TAX
Year 1943

Income tax net income	$125,012.63
Less: Personal exemption	600.00
Surtax net income	$124,412.63
Less: Earned income credit	1,400.00
Balance subject to normal tax	$123,012.63
Normal tax at 6% on $123,012.63	$ 7,380.76
Surtax on $124,412.63	78,425.98
Total income tax	$ 85,806.74
Total alternative tax	$ 83,962.24
Total income tax	$ 83,962.24

Exhibit A—(Continued)

Victory tax net income	$119,896.13	
Less: Specific exemption	624.00	
Income subject to victory tax	$119,272.13	
Victory tax before credit (5% of $119,272.13)	$ 5,963.61	
Less: Victory tax credit—maximum	500.00	
Net victory tax		5,463.61
Income and victory tax for 1943		$ 89,425.85
Income tax for 1942		$ 151.93
Amount of 1942 or 1943 tax, whichever is larger		$ 89,425.85
Forgiveness feature:		
Amount of 1942 or 1943 tax whichever is smaller	$ 151.93	
Amount forgiven (¾ of $151.93)	113.95	
Amount unforgiven		37.98
Correct income and victory tax liability		$ 89,463.82
Income and victory tax disclosed by return; page 4—line 20 Original, Account No. 962787 First California District		27,240.97
Deficiency of income and victory tax		$ 62,222.85

EXHIBIT A—(Continued)

Depreciation

Description	Date Acquired Prior to	Cost	Estimated Life	Depreciation Allowed or Allowable Prior Years	Unrecovered Cost 1-1-42	Depreciation 1942	Depreciation 1943
Ranch Property:							
Machinery and equipment	1932	$ 1,000.00	10 years	$ 1,000.00	$ 0.00	$ 0.00	$ 0.00
Machinery and equipment	1937	1,000.00	10 years	500.00	500.00	50.00	50.00
Liquor Store	1938	4,000.00	25 years	640.00	3,360.00	160.00	160.00
Machinery and equipment	1938	1,500.00	10 years	600.00	900.00	150.00	150.00
Winery:							
Building	1941	6,500.00	25 years	260.00	6,240.00	260.00	260.00
Trucks and equipment	1941	1,500.00	5 years	300.00	1,200.00	300.00	300.00
Buildings	1942-1943	10,000.00	25 years	0.00	10,000.00	200.00	400.00
Winery equipment	1942-1943	12,000.00	10 years	0.00	12,000.00	600.00	1,200.00
Total depreciation allowed						$1,720.00	$2,520.00
Amount claimed						0.00	4,904.50
Adjustment—increase or decrease						$1,720.00	($2,384.50)

EXHIBIT B

POWER OF ATTORNEY

Know All Men By These Presents: That I, Giulio Particelli, of the City of Sebastopol, County of Sonoma, State of California, have made, constituted and appointed, and by these presents do make, constitute and appoint H. L. Hotle of the City of Sebastopol, County of Sonoma, State of California, my true and lawful attorney for me and in my name, place, and stead, and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof, by attachments, arrests, distress or otherwise, and to compromise and agree for the same, and acquittances, or other sufficient discharges for the same, for me, and in my name, to make, seal and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments and accept the seizin and possession of all lands and all deeds and other assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, encumber by Deed of Trust and hypothecate lands, tenements and hereditaments, upon such terms and conditions, and under such covenants, as he shall think fit. Also to endorse checks payable to me and to deposit the same in my com-

Exhibit B—(Continued)

mercial account in the Bank of Sonoma County, at Sebastopol, California, and to draw checks in my name on my said commercial account in the Bank of Sonoma County at Sebastopol, California; Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action and other property in possession or in action, and to make, do, and transact all and every kind of business of what nature or kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, deeds of trust, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debts, releases and satisfaction of mortgage, deeds of trust, judgments and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises. Also, in the event any legal question arises in connection with any of my business affairs that my said attorney in fact may be from time to time handling hereunder, to consult S. K. McMullin, Attorney at Law, Santa Rosa, California, concerning the same, and to pay said S. K. McMullin for his services in connection therewith.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully

Exhibit B—(Continued)

to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that my said attorney or his substitute or substitutes, shall lawfully do or cause to be done by virtue of these presents.

Witness my hand this 29th day of April, 1949.

/s/ GIULIO PARTICELLI

State of California,
County of Sonoma—ss.

On this 29th day of April, in the year One Thousand Nine Hundred and Forty-nine, before me, S. K. McMullin, a notary public in and for said County of Sonoma, State of California, residing therein, duly commissioned and sworn, personally appeared Giulio Particelli known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City of Santa Rosa in said County the day and year in this certificate first above written.

[Seal] /s/ S. K. McMULLIN,
Notary Public in and for the County of Sonoma, State of California. My Commission expires January 14, 1950.

[Endorsed]: T.C.U.S. Filed Oct. 17, 1949.

[Title of Tax Court and Cause No. 25439.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1 to 4, inclusive. Admits the allegations contained in paragraphs 1 to 4, inclusive, of the petition.

5. (a) to (f), inclusive. Denies that the Commissioner erred in the determination of the deficiencies as alleged in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition.

6. (a) 1, 2 and 3. Denies the allegations contained in subparagraphs (a) 1, 2 and 3 of paragraph 6 of the petition.

6. (b) 1. Admits the allegations contained in subparagraph (b) 1 of paragraph 6 of the petition, except denies that the selling price of the winery was $273,000.00.

6. (b) 2. Admits the allegations contained in subparagraph (b) 2 of paragraph 6 of the petition, except denies that the selling price of the wine was $77,000.00.

6. (b) 3 and 4. Denies the allegations contained in subparagraphs (b) 3 and 4 of paragraph 6 of the petition.

6. (c) 1. Denies the allegations contained in subparagraph (c) 1 of paragraph 6 of the petition.

6. (d) 1 and 2. Denies the allegations contained in subparagraphs (d) 1 and 2 of paragraph 6 of the petition.

6. (e) 1. Admits that during the calendar year 1943, petitioner paid one Arthur Guerrazzi the amount of $5,600.00, but denies the remaining allegations contained in subparagraph (e) 1 of paragraph 6 of the petition.

6. (e) 2 and 3. Denies the allegations contained in subparagraphs (e) 2 and 3 of paragraph 6 of the petition.

6. (f) 1. Admits that during the calendar year 1943, petitioner paid one Clotilde Guerrazzi the amount of $5,600.00, but denies the remaining allegations contained in subparagraph (f) 1 of paragraph 6 of the petition.

6. (f) 2 and 3. Denies the allegations contained in subparagraphs (f) 2 and 3 of paragraph 6 of the petition.

7. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. NEBLETT,
Division Counsel
T. M. MATHER,
LEONARD ALLEN MARCUSSEN,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Dec. 6, 1949.

The Tax Court of the United States

Docket No. 25440

ELETTA PARTICELLI, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols: San Francisco Division, IRA : 90-D : DRU (C-TS : PD:SF:WGW)) dated July 21, 1949, and as a basis for her proceeding alleges as follows:

1. The petitioner is an individual with her principal residence at 1350 Francisco Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on July 21, 1949.

3. The taxes in controversy are individual income and victory taxes for the calendar year 1943 in the amount of $62,222.85.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in reducing the deduction allowable for depreciation on business assets in which petitioner had a community property interest to an amount less than $3,012.25 for the calendar year 1942 and to an amount less than $4,904.50 for the calendar year 1943.

(b) Commissioner erred in determining that of the total consideration of $350,000.00 received during the calendar year 1943 for wine, winery and equipment, in which the petitioner had a community property interest:

(1) An amount less than $273,000.00 should be allocated to the winery and equipment, and

(2) An amount more than $77,000.00 should be allocated to the wine.

(c) The Commissioner erred in determining that the tax basis of said winery and equipment was an amount less than $55,366.00.

(d) The Commissioner erred in reducing the deduction allowable for amounts expended by petitioner's husband, Giulio Particelli, from community property funds during the calendar year 1943 for the purchase of grapes to an amount less than $117,618.73.

(e) The Commissioner erred in reducing the deduction allowable for compensation paid by peti-

tioner's husband from community property funds during the calendar year 1943 for the services of one Arthur Guerrazzi to an amount less than $5,600.00.

(f) The Commissioner erred in reducing the deduction allowable for compensation paid by petitioner's husband from community property funds during the calendar year 1943 for the services of one Clotilde Guerrazzi to an amount less than $5,600.00.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

Error (a)—Depreciation on business assets.

1. The dates of acquisition, the adjusted basis as at January 1, 1942, and the reasonable allowance for depreciation on business assets in which the petitioner had a community property interest during the calendar years 1942 and 1943 are as follows:

[Printer's Note: The two tabulated pages are duplicates of pages 6-7 set out in full in this printed record.]

2. All of said business assets which are described as "Winery in Forestville" were used exclusively for business purposes from the dates of acquisition to the date said winery was sold.

3. All of said business assets which are described as "Farming Properties, Etc." were used exclusively for business purposes from the dates of acquisition to December 31, 1943.

Error (b)—Allocation of consideration received on sale of wine, winery and equipment.

1. On or about December 6, 1943, petitioner's

husband as seller entered into an "Agreement of Sale" in which he agreed to sell and one John Dumbra agreed to buy "all that certain winery known as Lucca Winery located at Forestville, Sonoma County, California, together with two acres more or less of land on which said winery is located, all buildings now located thereon, all fixtures, equipment, supplies (other than wine), goodwill, trade names, formulas, and all other personal property of every kind and description now belonging to or a part of said Lucca Winery, for the total sum of $273,000.00".

2. In a separate paragraph in said agreement of sale it was further understood and agreed that petitioner would sell and the said John Dumbra would buy "275,000 gallons of wine now in storage in said Lucca Winery at the total price of $77,-000.00".

3. Said agreement of sale was executed in accordance with its terms prior to December 31, 1943.

4. The consideration of $77,000.00 paid for the 275,000 gallons of wine included in said agreement of sale was the maximum price at which said wine could be sold at the date of the agreement without violating the regulations of the Office of Price Administration covering the sale of bulk wines.

Error (c)—Tax basis of winery and equipment.

1. The adjusted basis for determining gain or loss from said sale of winery, land, buildings, fixtures, equipment, supplies (other than wine), goodwill, trade names, formulas, and all other personal property of every kind and description belonging

to or a part of said Lucca Winery was an amount not less than $55,366.00.

Error (d)—Decrease in cost of grapes purchased.

1. During the calendar year 1943 petitioner's husband expended from community property funds the total amount of $117,618.73 for the purchase of grapes.

2. All of said grapes were purchased and used by petitioner's husband in the production of wine for sale to customers in the ordinary course of his business.

Error (e)—Compensation paid Arthur Guerrazzi.

1. During the calendar year 1943, petitioner's husband paid one Arthur Guerrazzi from community property funds the amount of $5,600.00 solely as compensation for services rendered in the conduct of the business conducted by petitioner's husband.

2. Said Arthur Guerrazzi was employed as a full-time salesman.

3. Said $5,600.00 did not exceed the reasonable value of the services of the said Arthur Guerrazzi to the petitioner for the calendar year 1943.

Error (f) — Compensation paid Clotilde Guerrazzi:

1. During the calendar year 1943 petitioner's husband paid one Clotilde Guerrazzi from community property funds the amount of $5,600.00 solely as compensation for services rendered in the conduct of his business.

2. Said Clotilde Guerrazzi was a full-time em-

ployee engaged in the operation of a retail liquor store located in Forestville, California; in bottling wine for sale; in keeping records; and in performing miscellaneous other activities connected with the business.

3. Said $5,600.00 did not exceed the reasonable value of the services of the said Clotilde Guerrazzi to petitioner and her husband for the calendar year 1943.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that no deficiency in income and victory taxes is due from this petitioner for the calendar year 1943.

/s/ GEORGE E. OEFINGER, C.P.A.,
/s/ HARRISON H. SIMPSON, Esq.,
Counsel for Petitioner

State of California,
City and County of San Francisco—ss.

Arthur Guerrazzi, being duly sworn, says that the petitioner herein died on October 12, 1949; that affiant is named as executor of petitioner's estate in her last will and testament; that affiant intends to accept appointment as said executor but the formal appointment will not be made prior to October 19, 1949, the due date of this petition; that affiant will submit evidence of his appointment to the Court as soon as letters testamentary are issued; that affiant has read the foregoing petition and is familiar with the statements contained therein; and that to the

best of his knowledge and belief the statements contained in said petition are true.

/s/ ARTHUR GUERRAZZI,
as Executor of the Estate of Eletta Particelli, Deceased, 1350 Francisco St., San Francisco, California.

Subscribed and sworn to before me this 14th day of October, 1949.

[Seal] /s/ MARIAM L. ASHBY,
Notary Public in and for the City and County of San Francisco, State of California. My commission expires Jan. 10, 1953.

EXHIBIT A

Form 1279 (Rev. Mar. 1946) SN-IT-7

Treasury Department, Internal Revenue Service

Office of Internal Revenue Agent in Charge,
San Francisco Division
IRA:90-D:DRU (C:TS:PD SF:WGW)

Mrs. Eletta Particelli July 21, 1949
1350 Francisco St., San Francisco, Calif.

Dear Mrs. Particelli:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of $62,222.85, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,
/s/ By F. M. HARLESS,

Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form of Waiver
Exhibit A.

Statement

Tax liability for the Taxable Year ended December 31, 1943.

	Deficiency
Income and victory tax	$62,222.85

In making this determination of your tax liability, careful consideration has been given to your protest filed August 31, 1948 and to the statements made at the conferences held on October 5, 1948 and May 27, 1949.

ADJUSTMENTS TO NET INCOME
Year 1942

Net income as disclosed by return (joint return)	$3,410.50
Nontaxable income and additional deductions:	
(a) Business income	519.95
Net income as adjusted	$2,890.55

Explanation of Adjustments

(a) You claimed no depreciation on your return for 1942. You now contend that the allowable depreciation for 1942 should be $3,012.25, divisible equally with your spouse. The amount allowable as a deduction for depreciation for 1942 has been found to be $1,720, divisible equally with your spouse. (Exhibit A atached hereto.)

[Printer's Note: Beginning with "Computation of Tax, Year 1942" on page 2 of Exhibit A the balance of this statement is duplicated at pages 14-19, inclusive, of this printed record.]

[Endorsed]: T.C.U.S. Oct. 17, 1949.

[Title of Tax Court and Cause No. 25440.]

ORDER

For cause appearing of record in the verification to the petition filed in the proceeding at the docket number above, it is

Ordered, that the caption of this proceeding is amended to read "Estate of Eletta Particelli, deceased, Arthur Guerrazzi, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket Number 25440."

Dated: Washington, D. C., October 26, 1949.

[Seal] /s/ JOHN W. KERN,
Judge

[Title of Tax Court and Cause No. 25440.]

MOTION TO RATIFY AND CONFIRM EXECUTION OF PETITION

Comes now the petitioner above-named, by its counsel, George E. Oefinger and Harrison H. Simpson, and respectfully

Moves that the act of Arthur Guerrazzi in executing the petition filed by petitioner with The Tax Court of the United States on October 17, 1949 be ratified and confirmed as the act of the duly appointed Executor of the Estate of Eletta Particelli, deceased. In support of this motion petitioner shows as follows:

1. Petitioner's decedent, Eletta Particelli, died

on October 12, 1949 as is evidence by the attached death certificate.

2. The said Arthur Guerrazzi executed said petition as Executor of the Estate of Eletta Particelli because he was named as such Executor in the last will and testament of the said Eletta Particelli.

3. The said Arthur Guerrazzi was duly appointed the Executor of said Estate by the Superior Court of the State of California in and for the City and County of San Francisco on November 15, 1949 as is evidenced by the attached certified copy of letters testamentary.

4. The act of the said Arthur Gerrazzi in executing said petition has been ratified and confirmed as the official act of said Arthur Guerrazzi as Executor of said Estate by the Superior Court of the State of California in and for the City and County of San Francisco by an order issued on November 15, 1949. A certified copy of said order is attached hereto.

Wherefore, it is prayed that this motion be granted.

/s/ GEORGE E. OEFINGER, C.P.A.,
/s/ HARRISON H. SIMPSON,
Counsel for Petitioner

Death Certificate and Order Ratifying Act of Executor attached.

T.C.U.S. Granted Nov. 23, 1949.

[Endorsed]: T.C.U.S. Filed Nov. 21, 1949.

[Title of Tax Court and Cause No. 25440.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1. Denies the allegations contained in paragraph 1 of the petition.

2 to 4, inclusive. Admits the allegations contained in paragraphs 2 to 4, inclusive, of the petition.

5. (a) to (f), inclusive. Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (a) to (f), inclusive, of paragraph 5 of the petition.

6. (a) 1, 2 and 3. Denies the allegations contained in subparagraphs (a) 1, 2 and 3 of paragraph 6 of the petition.

6. (b) 1. Admits the allegations contained in subparagraph (b) 1 of paragraph 6 of the petition, except denies that the selling price of the winery was $273,000.00.

6. (b) 2. Admits the allegations contained in subparagraph (b) 2 of paragraph 6 of the petition, except denies that the selling price of the wine was $77,000.00.

6. (b) 3 and 4. Denies the allegations contained in subparagraphs (b) 3 and 4 of paragraph 6 of the petition.

6. (c) 1. Denies the allegations contained in subparagraph (c) 1 of paragraph 6 of the petition.

6. (d) 1 and 2. Denies the allegations contained in subparagraphs (d) 1 and 2 of paragraph 6 of the petition.

6. (e) 1. Admits that during the calendar year 1943, petitioner paid one Arthur Guerrazzi the amount of $5,600.00, but denies the remaining allegations contained in subparagraph (e) 1 of paragraph 6 of the petition.

6. (e) 2 and 3. Denies the allegations contained in subparagraphs (e) 2 and 3 of paragraph 6 of the petition.

6. (f) 1. Admits that during the calendar year 1943, petitioner paid one Clotilde Guerrazzi the amount of $5,600.00, but denies the remaining allegations contained in subparagraph (f) 1 of paragraph 6 of the petition.

6. (f) 2 and 3. Denies the allegations contained in subparagraphs (f) 2 and 3 of paragraph 6 of the petition.

7. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. NEBLETT,
Division Counsel
T. M. MATHER,
LEONARD ALLEN MARCUSSEN,
Special Attorneys,
Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed Dec. 6, 1949.

[Title of Tax Court and Cause No. 25440.]

MOTION FOR LEAVE TO AMEND PETITION

Comes now the petitioner, by its counsel George E. Oefinger, C.P.A., and Harrison H. Simpson, Esq., and respectfully

Moves The Tax Court for leave to file the attached amendment to the petition herein.

In support of this motion petitioner states:

Because of the death of petitioner's decedent after the preparation of the petition but before execution and filing the petitioner was erroneously described in said petition as an individual. By order of The Tax Court issued on October 26, 1949 the description and designation of the petitioner contained in the caption was amended to its present form. An amendment is required to conform the description and designation of the petitioner contained in the body of the petition with the true description and designation as set forth in the caption.

On page two of the petition the facts upon which the petitioner relies as the basis of the proceedings were listed under paragraph 6. As the immediately preceding paragraph was number 4 an amendment to make paragraph 6 read paragraph 5 is required in order to maintain the numerical sequence of the divisions of the petition.

Wherefore, this motion for leave to amend should be granted.

Dated: San Francisco, California, December 29, 1949.

Respectfully submitted,

/s/ GEORGE E. OEFINGER, C.P.A.,
/s/ HARRISON H. SIMPSON,
Counsel for Petitioner

T.C.U.S. Granted Jan. 3, 1950.

[Endorsed]: T.C.U.S. Filed Jan. 3, 1950.

[Title of Tax Court and Cause No. 25440.]

AMENDMENT TO PETITION

The petition heretofore filed in this proceeding is hereby amended in the following particulars:

(A) Paragraph 1 is amended to reads as follows:

"The petitioner is the Estate of Eletta Particelli, Arthur Guerrazzi, Executor whose address is 1350 Francisco Street, San Francisco, California.

(B) Paragraph 6 is amended to read paragraph 5.

Respectfully submitted,

/s/ GEORGE E. OEFINGER, C.P.A.,
/s/ HARRISON H. SIMPSON,
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed Jan. 3, 1950.

[Title of Tax Court and Cause No. 25440.]

ANSWER TO AMENDMENT TO PETITION AND AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner and for an amended answer admits and denies as follows:

1. Admit the allegations contained in paragraph 1 of the petition as amended.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. (a) to (f), inclusive. Denies the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (a) to (f), inclusive, of paragraph 4 of the petition.

5. (a) 1, 2 and 3. Denies the allegations contained in subparagraphs (a) 1, 2 and 3 of paragraph 5 of the petition.

5. (b) 1. Admits the allegations contained in sub-

paragraph (b) 1 of paragraph 5 of the petition, except denies that the selling price of the winery was $273,000.00.

5. (b) 2. Admits the allegations contained in subparagraph (b) 2 of paragraph 5 of the petition, except denies that the selling price of the wine was $77,000.00.

5. (b) 3 and 4. Denies the allegations contained in subparagraphs (b) 3 and 4 of paragraph 5 of the petition.

5. (c) 1. Denies the allegations contained in subparagraph (c) 1 of paragraph 5 of the petition.

5. (d) 1 and 2. Denies the allegations contained in subparagraphs (d) 1 and 2 of paragraph 5 of the petition.

5. (e) 1. Admits that during the calendar year 1943, petitioner paid one Arthur Guerrazzi the amount of $5,600.00, but denies the remaining allegations contained in subparagraph (e) 1 of paragraph 5 of the petition.

5. (e) 2 and 3. Denies the allegations contained in subparagraphs (e) 2 and 3 of paragraph 5 of the petition.

5. (f) 1. Admits that during the calendar year 1943, petitioner paid one Clotilde Guerrazzi the amount of $5,600.00, but denies the remaining allegations contained in subparagraph (f) 1 of paragraph 5 of the petition.

5. (f) 2 and 3. Denies the allegations contained in subparagraphs (f) 2 and 3 of paragraph 5 of the petition.

6. Denies generally and specifically each and

every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. NEBLETT,
Division Counsel
T. M. MAHER,
LEONARD ALLEN MARCUSSEN,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Feb. 1, 1950.

The Tax Court of the United States

[Title of Causes Nos. 25439, 25440.]

MINUTES OF PROCEEDINGS

Date: May 17, 18, 19, 1950. Place: San Francisco, Calif.

Assigned to Judge Hill, Division No. 2.

Counsel: For Petitioner, Valentine Brookes, Esq., 1720 Mills Tower, San Francisco, Calif. For Respondent: Leonard Allen Marcussen, Esq.

On the merits Yes. On motion of counsel to keep record open to receive stipulation and depositions

to be filed not later than July 15, 1950.

Ordered Granted; Proceeding to be kept open until July 15, 1950, for receipt of stipulation and depositions.

Filed at hearing: Stipulation of Facts; Entry of Appearance of Valentine Brookes, Esq.

Petitioner's brief: After filing of Depositions, 60 days; Reply, 25 days.

Respondent's brief: 45 days.

Petitioner's Exhibits: No. 10, Copy of telegram; No. 11, Analysis MFI.

Respondent's Exhibits: J, Tabulation; K, Statement; L, Letter; M, Letter; N, Letter; O, File MFI; P, Statement; Q, file folders MFI; R, Book and papers MFI; S, Income tax return; T, File folder and contents (18 sheets); U, Contract; V, Letter; W, Transcript of pet. day book; X, Income tax return; Y, Income tax return; Z, three letters.

/s/ MAUDE R. CARPENTER,
Acting Deputy Clerk

[Title of Tax Court and Causes Nos. 25439, 25440.]

STIPULATION OF FACTS

The parties to these proceedings, through their attorneys, hereby stipulate that the following facts exist and may be accepted by the Court as true to the same extent as if established by competent evidence, saving to the parties the right to introduce additional evidence not inconsistent herewith and to contend on brief that the stipulated facts are

irrelevant to the issues herein. This stipulation may be introduced in either proceeding above identified, or in both, or if the proceedings are consolidated for trial, in such consolidated proceeding.

1. Exhibit A-1 attached hereto is a true copy of a document entitled "Agreement of Sale" which was signed on December 6, 1943 by G. Particelli as Seller and John Dumbra as Buyer.

2. Attached hereto are Exhibits B-2 and C-3 which are true copies of two letters from Tiara Products Company, Inc., to Bank of Sonoma County, dated December 21, 1943. These letters were delivered to the Bank by A. M. Mull, Jr., attorney for Tiara Products Company, Inc. At the same time, there was delivered by Mr. Mull to the Bank two checks drawn by Tiara Products Company, Inc., in favor of the Bank, in the respective amounts of $330,000 and $15,000, both dated December 21, 1943.

3. Attached hereto as Exhibit D-4 is a true copy of a letter dated December 28, 1943, to the Bank of Sonoma County, which was delivered to the Bank on December 28, 1943 in substitution for Exhibit C-3, which was then withdrawn.

4. Attached hereto as Exhibits E-5 and F-6 are letters addressed to the Bank of Sonoma County by petitioner G. Particelli and Eletta Particelli, and which were received by the Bank on December 21, 1943.

5. Attached hereto as Exhibtis G-7, H-8 and I-9 are true copies of bills of sale and a grant deed by G. Particelli and Eletta Particelli to Tiara Products Co., Inc.

6. Tiara Products Company, Inc., was the undisclosed principal of the John Dumbra who signed the document entitled "Agreement of Sale." The G. Particelli referred to in the aforesaid exhibits is Giulio Particelli, petitioner in Docket No. 25439. The late Eletta Particelli, deceased, was the wife of Giulio Particelli throughout 1943, and all property sold was community property of the spouses acquired subsequent to July 29, 1927.

/s/ CHARLES OLIPHANT,
Counsel for Commissioner
/s/ VALENTINE BROOKES
/s/ ARTHUR H. KENT,
/s/ GEORGE E. OEFINGER,
Counsel for Petitioner

EXHIBIT A-1

Agreement of Sale

Receipt of the sum of $5,000.00 to apply on the total purchase price of $350,000.00 is hereby acknowledged this sixth day of December, 1943, by the undersigned, G. Particelli, for the following purposes:

It is hereby understood and agreed that the said G. Particelli will sell to John Dumbra, and the said John Dumbra agrees to buy, all that certain winery known as Lucca Winery located at Forestville, Sonoma County, California, together with two acres more or less of land on which said winery is located, all buildings now located thereon, all fixtures, equipment, supplies (other than wine), goodwill,

trade names, formulas, and all other personal property of every kind and description now belonging to or a part of said Lucca Winery, for the total sum of $273,000.00.

It is further understood and agreed that the said G. Particelli will sell to John Dumbra, and the said John Dumbra agrees to buy, 275,000 gallons of wine now in storage in said Lucca Winery at the total price of $77,000.00.

It is further understood and agreed that the balance of said total purchase price for both the said winery and wine, amounting to $345,000.00, will be paid on or before December 21, 1943, at which time said G. Particelli agrees to furnish clear title to said real and personal property.

It is understood by both parties hereto that the so-called "bottling plant" now owned by the said G. Particelli is not a part of this agreement.

Signed this sixth day of December, 1943.

.....
Seller

.....
Buyer

EXHIBIT B-2

Sebastopol, California
Dec. 21, 1943

Bank of Sonoma County
Sebastopol, California

Gentlemen:

We are enclosing herewith our check for $77,000.00 which you are to deliver to G. Particelli when

he has delivered to you a Bill of Sale to 256,000 gallons of dry table wine located at the Lucca Winery, Forestville, California, and 19,000 gallons of dry table wine located in the Scatena Bros. Winery, Healdsburg, California, and when you have recorded the above Bill of Sale and obtained from the Sonoma Title Guaranty Co. a title report, indicating the wine to be in the name of Tiara Products Co., Inc., free and clear of all encumbrance.

Yours very truly,

TIARA PRODUCTS CO., INC.,
/s/ By A. M. MULL, JR.,
Its Attorney

The Bank of Sonoma County hereby acknowledges receipt of the above sum of $77,000.00.

BANK OF SONOMA COUNTY,
/s/ By H. L. HOTLE, President

EXHIBIT C-3

Copy
Bank of Sonoma County
Sebastopol, California

Sebastopol, California
Dec. 21, 1943

Gentlemen:

We are enclosing herewith the sum of $268,000.00, which represents the purchase of the Lucca Winery and the purchase of all the equipment and personal property now contained therein.

You are authorized to deliver the above sum to Mr. G. Particelli when you have recorded a Bill of Sale and Grant Deed from G. Particelli et ux to

Tiara Products Co., Inc., and have obtained a title insurance policy in the sum of $100,000.00, showing the property in the name of the Tiara Products Co., Inc., a corporation, free and clear of all encumbrance, with the exception of the second installment of 1943-44 taxes, and a title report showing the personal property in the name of the Tiara Products Co. free and clear of all encumbrance.

The title insurance premium is to be paid equally by the purchaser and the seller; the recording charges and the escrow fee in the sum of $25.00 are to be paid for by the purchaser. Taxes are to be pro rated as of December 31, 1943.

All fire insurance policies are to be cancelled unless we have advised you to the contrary before you have closed the transaction.

Yours very truly,

TIARA PRODUCTS CO., INC.,
/s/ By A. M. MULL, JR.,
Its Attorney

The Bank of Sonoma County hereby acknowledges receipt of the above sum of $268,000.00.

BANK OF SONOMA COUNTY
/s/ By H. L. HOTLE, President

EXHIBIT D-4

Bank of Sonoma County — Copy
Sebastopol, California — 12/28/43

Gentlemen:

We are enclosing herewith the sum of $268,000

which represents the balance of the purchase price of the Lucca Winery, Forestville, California, and the purchase price of all of the equipment and the personal property now contained therein, other than the stock of wine.

You are authorized to deliver the sum of $268,000 immediately to Mr. G. Particelli when you have in your possession a bill of sale and grant deed from Mr. G. Particelli and wife to Tiara Products Company, Inc., and when you have released of record the deed of trust dated October, 1943, in the sum of $47,500, from Particelli to the Bank of Sonoma County, and a deed of trust dated November 4, 1943, in the sum of $22,500, Particelli to the Sebastopol National Securities Company, together with chattel mortgage dated November 4, 1943, and recorded in volume 593, page 267, Sonoma County Records, and chattel mortgage dated November 4, 1943, and recorded November 8, 1943, in volume 595, page 253, Official Records.

We have checked the bill of sale and grant deed which you have in your possession and upon which we have indicated our approval. You are directed to deliver to us the grant deed and bill of sale unrecorded referred to above at the time of advice from Mr. Particelli of issuance to us by the Internal Revenue Service of Wine Producer's and Blender's Basic Permit at the location of Lucca Winery, and in any event not later than March 1, 1944.

You are not to be responsible in any way for the validity of the above instruments or the condition of the title to the property herein referred to. Your

entire responsibility shall end upon the delivery of the above instruments to us.

Yours very truly,

TIARA PRODUCTS COMPANY, INC.
/s/ By A. M. MULL, JR., Its Attorney

These instructions supercede and replace all of our former escrow instructions relating to the Particelli sale.

TIARA PRODUCTS COMPANY, INC.
/s/ By A. M. MULL, JR., Its Attorney

Receipt is hereby acknowledged of the above instructions. Dec. 28, 1942.

BANK OF SONOMA COUNTY
/s/ By H. L. HOTLE, President

EXHIBIT E-5

Copy
Bank of Sonoma County
Sebastopol, California

Sebastopol, California
Dec. 21, 1943

Gentlemen:

We are enclosing herewith Grant Deed, G. Particelli and Eletta Particelli, conveying the Lucca Winery to the Tiara Products Co., Inc., together with Bill of Sale to all of the equipment now located in said winery.

You are to deliver these instruments to the above purchaser after the payment for our account of the sum of $268,000.00 and issuance to such purchaser

of Wine Producers and Blenders Basic Permit at Lucca Winery premises.

With reference to the winery bond and fire insurance, the cancellation or proration of insurance premium is at the option of the purchaser.

The taxes are to be pro rated as of December 31, 1943.

You are authorized to place on the above Deed revenue stamps in the sum of $110.00.

Yours very truly,

/s/ G. PARTICELLI
/s/ ELETTA PARTICELLI

EXHIBIT F-6

Sebastopol, California
Dec. 21, 1943

Bank of Sonoma County
Sebastopol, California

Gentlemen:

We are enclosing herewith a Bill of Sale of bulk wine from G. Particelli and Eletta Particelli to the Tiara Products Co., Inc., a corporation.

You are to deliver this Bill of Sale upon the payment for our account of the sum of $77,000.00, which represents a sale of 275,000 gallons of wine at our ceiling price of 28c per gallon.

Yours very truly,

/s/ G. PARTICELLI,
/s/ ELETTA PARTICELLI

EXHIBIT G-7

Copy Bill of Sale

Know All Men By These Presents:

That We, G. Particelli and Eletta Particelli, his wife, Parties of the first part, in consideration of the sum of Ten Dollars ($10.00), current lawful money of the United States of America, to us in hand paid by Tiara Products Company, Inc., a corporation, Party of the second part, and other valuable consideration, the receipt whereof is hereby acknowledged, do by these presents sell and convey unto the Party of the Second Part and its assigns all of the machinery, fixtures, furniture, equipment and all other personal property and contents, excepting wine, now a part of and contained in that certain winery known as Lucca Winery located at Forestville, County of Sonoma, State of California, together with all of our rights in the name of Lucca Winery and any other trade names, including "Sonoma Wine", and the good will of said winery. Said personal property is more specifically described as follows:

Miscellaneous supplies
3 Wine Pumps
1 Crusher (grape)
2 Hydraulic Presses—Complete
1 Steam Boiler
400 feet wine hose
1 filter (500 gal. per hour cap.)
1 platform scale
1 Truck scale

4 Conveyors (pomice)
Formulas
Miscellaneous hand tools and all other personal property now located on said premises known as Lucca Winery.

To Have and to Hold the same unto the Party of the second part, and assigns, forever.

And We do for our heirs, executors and administrators, covenant and agree, with the Party of the Second Part, and its assigns, to warrant and defend the sale of the said property, goods, and chattels unto the Party of the Second Part, and its assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof We have hereunto set our hands this 21st day of December, 1943.

/s/ G. PARTICELLI
/s/ ELETTA PARTICELLI
Parties of the First Part

EXHIBIT H-8

Copy

Bill of Sale of Bulk Wine

Know All Men By These Presents:

That We, G. Particelli and Eletta Particelli, his wife, Parties of the First Part, in consideration of the sum of Ten Dollars ($10.00) current lawful money of the United States of America, to us in hand paid by Tiara Products Company, Inc., a cor-

poration, Party of the Second Part, and other valuable consideration, the receipt whereof is hereby acknowledged, do by these presents sell and convey unto the Party of the Second Part, and its assigns, the following bulk wine:

Two Hundred and Fifty-Six Thousand (256,000) gallons of dry table wine, now located in that certain winery known as Lucca Winery, Forestville, County of Sonoma, State of California; and

Nineteen Thousand (19,000) gallons of dry table wine, now located in that certain winery known as Scatena Bros. Winery, Healdsburg, County of Sonoma, State of California.

To Have and to Hold the same unto the Party of the Second Part and its assigns, forever.

And we do for our heirs, executors and administrators, covenant and agree with the Party of the Second Part, and its assigns, to warrant and defend the sale of the said property, goods, and chattels unto the Party of the Second Part, and its assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof We have hereunto set our hands this 21st day of December, 1943.

/s/ G. PARTICELLI
/s/ ELETTA PARTICELLI
Parties of the First Part

EXHIBIT I-9

Copy

GRANT DEED

For Value Received, G. Particelli and Eletta Particelli, husband and wife, Grant to Tiara Products Company, Inc., a corporation, all that real property situate in the County of Sonoma, State of California, bounded and more particularly described as follows, to-wit:

Parcel One: Beginning at the point of intersection of the Westerly line of First Street as said Street is shown on the map of G. W. Winter's Addition to the Town of Forestville, filed in the office of the County Recorder of said County of Sonoma, February 6, 1904, with the Northerly line of the land of the Petaluma and Santa Rosa Railroad Co., said Northerly line being the South boundary, or its prolongation, of a street shown on said map; thence South 0° 05′ West along the Southerly prolongation of said line of First Street 36.64 feet to a point distant 10 feet Northerly at right angles from the center line of main track of the Petaluma and Santa Rosa Railroad Co.; thence Southwesterly concentric with said center line along a curve to the left of a radius of 337.72 feet (the chord of which bears South 44° 27′ West 359.02 feet) a distance of 378.51 feet to the Southeasterly line of the parcel of land described in the Deed from George W. Winter and Elizabeth Winter to Burke Corbet, dated April 4, 1905, and recorded August 7, 1905, in Liber 221 of Deeds, at page 87, Sonoma County Records; thence

South 70° 10′ West along said Southeasterly line 52.25 feet; thence North 6° 11′ West 161.65 feet; thence North 0° 05′ East 149.97 feet to said North line of the land of the Petaluma and Santa Rosa Railroad Co.; thence East thereon 317.80 feet to the point of beginning, containing 1.09 acres, more or less.

Parcel Two: Commencing at the point of intersection of the Westerly line of First Street as said Street is shown on the map of G. W. Winter's Addiiton to the Town of Forestville, filed in the office of the County Recorder of said County of Sonoma, February 6, 1904, with the Northerly line of the land of the Petaluma and Santa Rosa R.R. Co. said Northerly line being the South boundary, or its prolongation, of a street shown on said map; thence South 0° 05′ West along the Southerly prolongation of said line of First Street, 36.64 feet thence South 44° 27′ West 359.02 feet to the Southeasterly line of the parcel of land described in the Deed from George W. Winter and Elizabeth Winter to Burke Corbet, dated August 4, 1905, and recorded August 7, 1905, in Liber 221 of Deeds, at page 87, Sonoma County Records; thence North 70° 10′ East along said Southeasterly line 40.40 feet to the point of beginning of the parcel of land to be described; thence North 70° 10′ East along said Southeasterly line 151.15 feet to the Westerly line of the parcel of land described in the Deed from the Petaluma and Santa Rosa Railroad Co., to the Miller Fruit Co., Inc., dated January 22, 1934; thence North 1° 26′ East along said Westerly line 134.20 feet; thence South 38° 07′ 31″ West 235.74 feet to the point of

beginning, containing 0.22 of an acre, more or less.

Witness our hands this 21st day of December, 1943.

/s/ G. PARTICELLI
/s/ ELETTA PARTICELLI

[Endorsed]: T.C.U.S. Filed May 17, 1950.

[Title of Tax Court and Causes Nos. 25439, 25440.]

STIPULATION OF FACTS, II.

The parties hereto, through their counsel, hereby stipulate that the following facts are true and may be considered a part of the record of this case:

1. The 275,000 gallons of wine purchased by Tiara Products Company, Inc. from G. Particelli and Eletta Particelli were entered on the books of account of Tiara Products Company, Inc. at a cost price of $77,000. This same cost figure was used for the wine in the closing inventory for 1943 and the opening inventory for 1944, as reflected in the federal income and excess profits tax returns of Tiara Products Company, Inc. for 1943 and 1944.

2. The Lucca Winery was entered on the books of account of Tiara Products Company, Inc. at a cost price of $273,000, and this figure was used as the cost of the winery in the federal income and excess profits tax returns filed by Tiara Products Company, Inc.

3. The entries of $77,000 and $273,000, respectively, were made in the books of account of Tiara Products Company, Inc. by a bookkeeper under the supervision of Mr. Joe Brown, the corporation's

independent accountant. The figures of $77,000 and $273,000 were obtained by Mr. Brown from the documents constituting Exhibits A-1 to H-8, inclusive.

4. Mr. Brown was the tax adviser of Tiara Products Company, Inc. He was not consulted by Mr. John Dumbra or by anyone on behalf of Tiara Products Company, Inc. prior to the purchase by the latter of the wine and winery from G. Particelli and Eletta Particelli, about any aspect or consequence of the purchase. In 1944 he advised Tiara Products Company, Inc. that there would be a tax advantage to it in selling the winery in that year.

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
/s/ GEORGE E. OEFINGER,
Counsel for Petitioner
/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent

[Endorsed]: T.C.U.S. Filed July 17, 1950.

[Title of Tax Court and Cause.]

Docket Nos. 25439, 25440

In December 1943 there was a ceiling price on bulk sales of wine but no regulation fixing a maximum price on sales of a winery with its inventory of wine. Petitioner sold his inventory of wine and winery for $350,000 without an agreement on the consideration for each class of property. The writ-

ten contract of sale specified an amount as the selling price of the wine and of the winery. Held, that the substance of the transaction was a sale of the wine and the winery for a lump sum and that of the total consideration, $275,000 was paid for the wine and $75,000 for the winery.

Valentine Brookes, Esq., for the petitioners.

Leonard Allen Marcussen, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

These proceedings were consolidated for hearing. Each case involves a deficiency in income tax for the year 1943 in the amount of $62,222.85 arising from community income. Issues settled by stipulation will be reflected in the computation under Rule 50. The only remaining issue, which is common to both proceedings, is whether respondent erred in his allocation of community income derived from the sale of an inventory of wine and a winery. The returns of the petitioners were filed with the collector at San Francisco, California.

Findings of Fact

The facts stipulated by the parties are found as agreed to by them.

Petitioner Giulio Particelli, a resident of Sebastopol, California, and the decedent in Docket No. 25440 were at all times material husband and wife. Giulio Particelli, whose transactions gave rise to

the question in issue, will be referred to for convenience as the petitioner.

Petitioner was born in 1891 and migrated to this country from Italy. He speaks and understands but can not read English. His spoken English is a somewhat broken dialect and is difficult for those not accustomed to it to understand.

Petitioner commenced the production of wine on a small scale on his farm shortly after the repeal of prohibition. In 1941 he commenced and, prior to the grape crush in 1943, fully completed the construction of a larger winery at Forestville, California, known as the Lucca Winery. The winery was equipped to crush grapes, to ferment the juice into wine, to rack and filter wine and store 256,000 gallons. The winery was not equipped to finish wine beyond the aging, racking and filtering stages. Petitioner's equipment for bottling wine was located in his retail store, which was located about 300 feet from the winery.

Prior to October 22, 1943, the Office of Price Administration, hereinafter referred to as "OPA", had a ceiling on bulk dry wine of 21½ cents a gallon, plus an amount not in excess of about 6 cents a gallon, computed on the basis of cost of grapes in 1942 over 1941, not exceeding $28.20 a ton. Effective October 22, 1943, the OPA placed a flat ceiling of 28 cents a gallon and 33 cents a gallon on bulk current red and white wines, respectively. At the same time it set flat ceilings for bottled wines.

Petitioner sold wine of his own production and of established winemakers. His wine was not fin-

ished and was the poorest and cheapest of the grades which he sold. His own wine would cloud and he could not sell it in bottles. He sold his own wine only in bulk in lots of 5, 10, 15, 25 or 50 gallons, or in carload lots when blended with finished wines. He generally sold the other wines in one-fifth, half-gallon and gallon bottles.

Most of the wine sold by petitioner in 1943, prior to November of that year, had been purchased from other producers. The various types and classes of the wine were sold for from 45 cents to $1.40 a gallon. He sold his own production of wine for 32 cents a gallon in 50-gallon lots, 33 to 35 cents in 25-gallon lots, and 38 cents a gallon in 5-gallon lots. All of the prices included Federal and state alcoholic beverage taxes, which in 1943 totaled 11 cents a gallon.

During the same period petitioner made one sale of about 60,000 gallons of wine in carload lots to a winery located in Ohio. The wine so sold was a blend in the ratio of ten parts of his production in 1942 to one part of some finished wine which he had purchased from another winery. The OPA ceiling price for the wine was about 27½ cents a gallon. The proceeds of the sale were $51,800.95.

Petitioner's crush of wine in 1943, consisting of about 245,000 gallons, was started in September and was completed in November. At that time he had about 30,000 gallons of wine on hand from his crush of about 100,000 gallons in 1942. The cost of the wine produced by petitioner in 1943 was from 50 cents to 52 cents a gallon. At that time he and other

wine producers expected that the OPA would increase the ceiling price of wine sold in bulk.

A blend of finished wine with unfinished wine will not produce finished wine. The winery which on two occasions had finished some wine for petitioner refused to do so again. Unless he could have his wine finished or blend it with finished wine petitioner could not sell his wine as case goods, because it would cloud and spoil, but he could sell it in bulk. In December 1943 petitioner's prior sources of supply for finished wine in bulk for blending purposes refused to sell him finished wine except as case goods, the price of which made the cost too high to use for blending.

Petitioner, since 1934, had had a line of credit from the Bank of Sonoma County or its predecessor on a secured and unsecured basis. On December 1, 1943, petitioner owed the bank $70,000 secured by all of his assets.

Orders issued by the Federal government to control the disposition of grapes created a scarcity of grapes in 1942 and 1943 available for producing wine and intensified the extremely high demand for wine in those years. During 1942 and 1943 the price of grapes was not subjected to regulation by public authority. In 1942 wineries paid an average of $30 a ton for grapes and in 1943 an average of $79. The normal crush of dry wine from a ton of grapes is about 160 gallons. Prior to 1942 about 80 per cent of all the wine produced in California was sold in bulk. Thereafter, there was a trend toward sales of wine in bottles, and by October or November

1943 bulk sales of unfinished wine had practically ceased. By the end of 1943 bulk sales of unfinished wine at the prevailing ceiling prices had ceased entirely. The cost of grapes in 1943 prevented wine producers from making a profit on bulk sales of unfinished wine at the ceiling price. There was no active market for wineries in 1943 without an inventory of wine. During that year, to obtain wine, bottlers were compelled to buy the winery in order to obtain the owner's inventory of wine.

During 1943 three methods were used by operators of wineries to legally dispose of their inventory of unfinished wine at prices in excess of OPA ceilings on bulk sales. One of the methods, known as contract or franchise bottling, which was commenced about October 1943, consisted of shipping the wine to a bottler to be bottled for the account of the winery, and then selling the bottled wine to the bottler. That method enabled the wine producer to obtain from 75 cents to $1.25 a gallon for his wine, depending upon its quality. Another plan, adopted in 1942, consisted of a sale by the wine producer of his inventory of wine and winery in one transaction for a lump sum price. The other method was one in which a bottler acquired the production of a winery by advancing funds for grapes to be crushed for the account of the bottler. The OPA issued a ruling in the fall of 1943 in response to a request of the Wine Institute, a trade and service organization for the wine industry of California, which constitutes about 90 per cent of the wine industry of the United States, that it would not inter-

fere with the contract or franchise bottling method. During 1942, 1943 and 1944, 50 to 60 wineries in California, which constituted more than one-half of the production capacity of wineries in California, were purchased in order to obtain their inventories of wine. Of the 50 to 60 wineries so sold during the period of 3 years, 20 or 25 were sold in 1943. In 1943 bottlers of wine searched sources of supply for wine and a producer was not required to exert any effort to sell his wine.

In December 1943 John Dumbra, hereinafter referred to as Dumbra, was in California for the purpose of locating wine for purchase by his employer, the Tiara Products Co., general wine merchants, hereinafter referred to a Tiara, with its principal office in New York City. Dumbra first discussed the purchase of wine from petitioner in Santa Rosa, California, the evening of December 4, 1943. After tasting the wine at the Lucca Winery the next day and finding it satisfactory, Dumbra offered to purchase three or four cars of the wine at petitioner's price. Petitioner's ceiling price for the wine was not discussed. Petitioner's reply to the offer was that he could not make a profit on sales of his wine in such quantities and as he wished to get out of the winery business, the only transaction he would consider would be one for the purchase of all of his wine and the winery. Further discussions resulted in an offer of petitioner to sell his inventory of wine and the winery for $350,000. Dumbra made a counter offer of $330,000, subject to approval of his principal. Later the same day Dumbra consulted his

brother, Victor Dumbra, president and general manager of Tiara, who authorized him to buy the wine and winery, paying, if necessary, the asking price of petitioner. Tiara did not want the winery but was willing to acquire it, if necessary, to obtain the wine at an overall price it could afford to pay. Petitioner would not accept less than $350,000 for the winery and his inventory of wine and Tiara accepted petitioner's offer to sell at that price. Petitioner informed Dumbra that "he was going to draw up the whole thing together," specifying one price for the wine and another for the winery and that "the price would be $350,000", to which Dumbra had no objection, provided the price did not exceed $350,000 and the quantity of wine was correct. Dumbra did not at any time agree to purchase the wine for $77,000 and the winery for $273,000. Tiara was compelled to purchase the winery to obtain the wine. While Dumbra at times felt that he was not understanding petitioner correctly, all of his doubts in that regard were eliminated before the negotiations were completed.

Dumbra and petitioner met in the office of petitioner's accountant in San Francisco on December 6, 1943. While there petitioner requested his accountant to compute the ceiling price on sales of bulk wine, which he did, and determined a price of not in excess of 28 cents a gallon, and so advised petitioner. Thereafter, on the same day, petitioner and Dumbra, acting for Tiara, executed an instrument reading in part as follows:

Agreement of Sale

Receipt of the sum of $5,000.00 to apply on the total purchase price of $350,000.00 is hereby acknowledged this sixth day of December, 1943, by the undersigned, G. Particelli, for the following purposes:

It is hereby understood and agreed that the said G. Particelli will sell to John Dumba, and the said John Dumbra agrees to buy, all that certain winery known as Lucca Winery located at Forestville, Sonoma County, California, together with two acres more or less of land on which said winery is located, all buildings now located thereon, all fixtures, equipment, supplies (other than wine), goodwill, trade names, formulas, and all other personal property of every kind and description now belonging to or a part of said Lucca Winery, for the total sum of $273,000.00.

It is further understood and agreed that the said G. Particelli will sell to John Dumbra, and the said John Dumbra agrees to buy, 275,000 gallons of wine now in storage in said Lucca Winery at the total price of $77,000.00.

It is further understood and agreed that the balance of said total purchase price for both the said winery and wine, amounting to $345,000.00, will be paid on or before December 21, 1943, at which time said G. Particelli agrees to furnish clear title to said real and personal property.

* * * * *

The agreement was drafted by petitioner's attorney

in accordance with instructions given to him by petitioner.

The Bank of Sonoma County acted as escrow agent for the parties in completing the transaction. On December 21, 1943, Tiara's attorney signed on behalf of Tiara, and delivered two letters of instructions to the escrow agent. One of the letters recited that Tiara was transmitting its check for $77,000 for delivery to petitioner upon the delivery of a bill of sale for 256,000 gallons of dry table wine located at Lucca Winery and 19,000 gallons of like wine located in the Scatena Bros. Winery, Healdsburg, California. The other letter recited that there was transmitted therewith Tiara's check of $268,000 for delivery to petitioner upon receipt of a deed and bill of sale for all of the property in the Lucca Winery other than the wine. Petitioner directed the escrow agent in writing to deliver his bill of sale for the wine on payment of the amount of $77,000 "which represents a sale of 275,000 gallons of wine at our ceiling price of 28c per gallon." Other instructions of petitioner to the escrow agent were to deliver the deed and bill of sale covering the winery to Tiara upon receipt of the amount of $268,000 and authorized it to place revenue stamps of $110 on the deed. The revenue stamps were based upon a valuation of $100,000 for the real estate conveyed. The amounts of the checks actually delivered to the escrow agent with the letters were $330,000 and $15,000. Delivery of the deed and bill of sale for the winery was to be made not later than March 1, 1944, but was not actually made until May 1, 1944, on account of delay

in obtaining a license in the name of the buyer. The proceeds of the checks totaling $345,000 were credited to the bank account of petitioner on December 31, 1943.

The wine and winery were entered on the books of Tiara at cost prices of $77,000 and $273,000, respectively. The amounts were used as cost in income and excess profits tax returns of Tiara. The entries were made by a bookkeeper under the supervision of Tiara's independent accountant, who obtained the figures entered in the books from the letters of instruction of the petitioner and Tiara to the escrow agent and the sales contract. The accountant was the tax adviser of Tiara but was not consulted by anyone on behalf of Tiara prior to the purchase about any aspect or consequences of the purchase. The figure of $77,000 was entered in the books as the cost of the wine because that amount was set up in the contract of sale as the selling price. Victor Dumbra did not learn of the entry for the wine until some undisclosed time after it was made.

Tiara did not in 1943 endeavor to purchase or purchase a winery without wine. It considered that it was paying from $1 to $1.12 per gallon for the wine acquired from petitioner, which was a price it could afford to pay in view of the prevailing high ceiling prices for wine in bottles, and the remainder for the winery. Tiara purchased the winery in order to obtain the wine. Tiara could make a net profit of about $2 a gallon on bottled wine, less the cost of the wine itself.

There was no active market in 1943 and 1944 for

wineries without an inventory of wine to sell with it. A few months after acquiring title to the Lucca Winery, Tiara offered the property for sale at the price of $60,000 but would have accepted an offer of $55,000 or $50,000. It refused offers of $40,000 and $45,000. There was a break in the market for wineries producing dry wines and the winery was sold in December 1944 for $20,000. Tiara's accountant advised it in 1944 that there would be a tax advantage to it in selling the winery in that year.

Tiara purchased wineries, other than the Lucca Winery, with their inventories of wine. One of such purchases was made in California in December 1943. At the time of their acquisition Tiara understood that regulations of the OPA permitted it to sell the wine so acquired at its ceiling prices for bulk and case goods. During the latter part of 1944 it learned that such ceiling prices applied only on deliveries of wine to customers from its own facilities and if it made deliveries to the customer from the winery which produced the wine, the applicable ceiling price was the ceiling of the winery which had been purchased. From 40 per cent to 50 per cent of the wine acquired by Tiara from petitioner was sold direct to customers from the Lucca Winery.

Petitioner was employed by Tiara in December 1943 at a salary of $100 per week to take care of the Lucca Winery. Before the sale involved herein was closed petitioner, with the consent of Tiara, withdrew 1,000 gallons of the wine for his personal use. In May 1944 when the contract of employment was terminated and Tiara owed petitioner $1,500 for his

services, petitioner allowed Tiara a credit of $1,000 for the wine withdrawn by him.

Of the total consideration of $350,000 involved in the transaction, $275,000 was paid for the wine and $75,000 for the winery.

In their returns for 1943 petitioners reported that the sale to Tiara on December 6, 1943, constituted a sale of wine for $77,000 and the winery for $273,000. Capital gain on the sale of the winery was computed on a cost basis of $61,165, less $5,799 for depreciation. In his determination of the deficiencies, respondent allocated $302,500 of the total selling price to the sale of wine and $47,500 to the winery and decreased the adjusted cost basis of the winery to $26,420.

Opinion

Hill, Judge: The gist of the contention of petitioners is that the parties entered into an arm's length transaction for the sale of the wine for $77,000 and the winery for $273,000, which agreement they embodied in the contract of sale and that the contract, therefore, not being a sham, the respondent has no power to disregard it. Respondent argues that the substance of the transaction was a sale of the two classes of property for $350,000 without any agreement on the purchase price of each and that under the circumstances his allocation on the basis of fair market value was proper. If there was an arm's length sale of the wine and the winery at fixed prices, as alleged by petitioners, no allocation would be necessary. Thomas J. McCoy, 15 T.C.828.

Whether there were separate sales as contended

by petitioner or one for a lump sum, as respondent alleges, is a question of fact to be determined from a consideration of all of the evidence. The instrument signed by the parties on December 6, 1943, is not controlling if the form thereof differs from the substance of the transaction. To arrive at the substance of the sale, all relevant facts of the transaction must be taken into account and considered as a whole. In Commissioner vs. Court Holding Co., 324 U. S. 331, the Court, in considering a question of whether a sale was in substance made by a corporation or its stockholders, said:

* * * The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

United States vs. Cumberland Public Service Co., 338 U. S. 451, involved a like question. The Court's decision there, as in the Court Holding Co. case, rested upon the ultimate finding of the trial court. It remarked that "It is for the trial court, upon

consideration of an entire transaction, to determine the factual category in which a particular transaction belongs" and in determining the question, we could look beyond the papers executed by the corporation and the shareholders and "consider motives, intent, and conduct in addition to what appears in written instruments used by the parties to control rights as among themselves."

The testimony of petitioner and that of other witnesses whose testimony he relies upon is to the effect that there were separate negotiations for each class of property. Other evidence cited by respondent to support his determination of a sale for a lump sum without an agreement on the selling price of the wine or winery is, in our opinion, more reasonable and therefore entitled to greater weight. No useful purpose would be served by a detailed discussion of all of the conflicting evidence.

At the time the transaction occurred wine was scarce and in great demand by bottlers. The ceiling price for the wine in petitioner's inventory was only about 55 per cent of its cost. Bottlers of wine, who had a high ceiling price for case goods, could pay considerably more than the ceiling price on bulk sales and still make a profit. Three methods were available to wine producers to dispose of their stocks of wine at a price in excess of 28 cents a gallon without violating regulations of the OPA. One of the methods was to sell the winery with its inventory of wine. That method was used numerous times in California in the taxable year. While there was no direct proof that petitioner was aware of the

three courses available to him for the sale of his wine for more than the prevailing ceiling price for wine alone, the inference is that they were known to him and that he availed himself of one of them. The sale involved here was made while those conditions prevailed.

Petitioner testified, in effect, that after sampling the wine at the winery on December 5 Dumbra accepted his offer to sell all of the wine at the prevailing ceiling price for sales in bulk, the amount to be determined by his accountant, that promptly after their oral agreement on the wine, Dumbra disclosed a desire to purchase the winery but declined to purchase it for his asking price of $300,000, that while in the office of his accountant the next day Dumbra offered $273,000 for the winery, which he accepted, and that thereafter "we told them to draw up two deals, one for the winery and one for the wine." Other testimony relied upon by petitioner adds nothing to his statement of the negotiations.

John Dumbra, a disinterested witness who negotiated the purchase for Tiara, testified that after finding the wine to be satisfactory on December 5, he first offered to buy four carloads and then three carloads of wine. Petitioner's response to the offer was, in substance, that he could not make a profit on sales of that quantity,[1] and that in view of the fact that he wanted to get out of business he would not consider the sale of any quantity of wine less than his

[1] The inference is that he had in mind his cost of production of about 50 cents a gallon and a ceiling price of 28 cents a gallon.

entire inventory, and the winery, for both of which he set a price of $350,000; that he, Dumbra, then made a counteroffer of $330,000 which petitioner refused; that after consulting his principal, petitioner's original offer was accepted, after which petitioner informed him that he would have the contract of sale prepared to show a sale of the wine at one price and the winery at another, the total to be $350,000, to which there was no objection provided the price did not exceed $350,000 and the quantity of wine was correct, and that he did not at that time make a separate agreement for the purchase of the wine for $77,000 and therafter ask petitioner if he would be interested in the sale of his winery or make a separate agreement for the purchase of the winery for $273,000.

Victor Dumbra testified that John Dumbra was sent to California with instructions to buy wine and to consult him about deals involving other than a few cars of wine; that it was a known fact that large quantities of wine were being sold "either as a stock sale or total sale of company"; that he did not endeavor to buy or buy a winery without wine in 1943; that while seeking wine for purchase, wineries were offered for sale with the wine, and that in such cases an evaluation was made to determine whether the winery offered with the wine in one transaction made the cost of the wine more than his company could afford to pay; and that when John consulted him about the deal with petitioner, he agreed to the overall price of $350,000 asked by

petitioner. The testimony of the Dumbras is supported by other evidence.

Petitioner in December 1943 informed F. Aberigi, who lived in or near Sebastopol and had known petitioner for about 50 years, that Tiara wanted to buy the wine only but "to make it legal on account of the O.P.A. ceiling" he sold "the winery and everything," that he received $1 a gallon for his stock of 400,000 gallons of wine and "Throw [sic] in the good will and the winery," and that he could not have obtained a dollar a gallon for the wine if he had sold the wine only. Petitioner had previously informed Aberigi of a sale over objections of the former's daughter of 100,000 gallons for 70 cents a gallon.

When making settlement in May 1944 with Tiara for its indebtedness to him for services, petitioner agreed to the application of a credit of $1,000, or $1 a gallon, for wine withdrawn by him after the sale for his personal use. Upon being questioned about the credit on cross-examination, petitioner first testified that the adjustment was on the basis of the price paid to him, which was the ceiling price of 28 cents a gallon and then, after further examination, that "they give it to me for the ceiling price like I sold to him", and that the credit for $1,000 was his or Tiara's attorney's mistake. Instead of a mistake, our opinion is that the parties agreed that the credit was a fair estimation of the amount paid by Tiara for the wine. Victor Dumbra testified that if Tiara had paid the full amount of $1,500 to petitioner, it "would have expected $1,000 back in cash, definitely." Moreover, petitioner instructed the es-

crow agent to affix revenue stamps on the deed for the winery on the basis of a valuation of $100,000. A valuation of that amount would leave out of the total consideration a selling price of about 91 cents a gallon for the wine, contrary to the contention being made that it was sold for the ceiling price of 28 cents a gallon.

The evidence must be viewed in the light of proof that Tiara was primarily interested in buying wine needed to remain in business and was willing to purchase wineries only when necessary to obtain wine at an overall price it could pay. Its lack of interest in wineries without a dependent sale of wine is otherwise shown by the fact that a short time after acquiring title to the Lucca Winery, Tiara put the property up for sale for $60,000 and in December 1944 actually sold it for $20,000. Petitioner, in effect, concedes that the winery had an original cost in 1943 of about $32,000. Victor Dumbra testified that when considering the purchase from petitioner he made a mental calculation of the transaction and concluded that the winery might be worth $50,000 or $60,000. It is apparent that under the circumstances Tiara would not have agreed to pay $273,000 for the winery and our opinion is that it did not so agree. Entries made in the books of Tiara showing a cost of $77,000 for the wine and $273,000 for the winery are not conclusive. Doyle vs. Mitchell Bros. Co., 247 U. S. 179. The books merely follow the written contract of sale.

We need not determine petitioner's motive for having the written contract of sale specify a sepa-

rate sales price for each class of property. The terms of the agreement in that regard were a matter of indifference to Tiara. It was not necessary to comply with an OPA regulation for there was no ceiling on wine when sold as a part of the business and therefore compliance with the ceiling price on the wine was not the objective. Had the respondent accepted petitioner's representation of sale, the result would have been a saving of tax to petitioner.

In Estate of Jacob Resler, 17 T.C.——(January 2, 1952), there was no basis for concluding that any part of the consideration was paid for other than the property taken, and, accordingly, no allocation was necessary. We conclude from a consideration of all of the evidence here that the written contract of sale does not reflect the agreement of the parties and the substance of the transaction between them was a sale of the wine and winery for $350,000 without any agreement on a selling price for each class of property. So concluding, it was proper for respondent to make an allocation to reflect the consideration paid for the wine and for the winery. Deutser, et al vs. Marlboro Shirt Co., Inc., 81 F. 2d 139, 142; Haverty Realty & Investment Co., 3 T.C. 161; Nathan Blum, 5 T.C. 702; C. D. Johnson Lumber Corp., 12 T.C. 348.

The statements attached to the notices of deficiency disclose that the apportionment made by the respondent of the total selling price was determined as "a fair allocation of the sale price of $350,000 * * *." He asserts on brief that the allocation was based upon fair market value of property.

While contending that the allocation set forth in the contract of sale is binding upon the respondent, petitioners argue that if fair market value is used as a basis no more than $77,000 should be ascribed to the wine. They made no argument as to the fair market value of the winery.

The petitioners' reasoning is that if the Government had seized the wine under an exercise of its power of condemnation, just compensation to them would have been measured by the fair market value of the property and that the ceiling price of 28 cents a gallon for bulk wine fixed that value. They cite United States vs. John J. Felon & Co., Inc., 334 U. S. 624, and United States vs. Commodities Trading Corp., et al, 339 U. S. 121, to support the argument. There is no factual basis here for the application of the cases.

The substance of the transaction here for tax purposes, as already pointed out, is an arm's length sale of two classes of property for one price for both without a ceiling price to limit the consideration. To apply the contention of petitioners to the winery would result in an absurdity, for the winery had a fair market value not in excess of $75,000 and, consequently, there would be an absence of assets to which to make an allocation of the remaining consideration paid in the transaction.

One of respondent's witnesses placed a fair market value of $1 a gallon on the wine and another of his witnesses testified that dry wine had a fair market value ranging from 75 cents to $1 a gallon, depending upon its quality. Victor Dumbra, another

witness for the respondent, first testified that he did not know the approximate amount of consideration that he was paying for the wine but referred to costs of $1, $1.10 or $1.12 a gallon. Thereafter he testified that before authorizing his brother to enter into the transaction, he made a mental calculation of the amount Tiara would be paying for the wine and the winery and although he could not remember the amount he estimated as the cost of the winery, he mentioned the amounts of $50,000, $60,000 and $40,000 in that order. His testimony discloses that he considered that Tiara was paying at least $1 a gallon for the wine, a price petitioner settled with it for the 1,000 gallons he withdrew from the inventory after the sale was made.

In his determination of the deficiencies, respondent allocated $302,500 to the sale of the wine, or $1.10 a gallon, and the remainder of $47,500 of the total selling price to the winery. Considering all of the evidence on the question we conclude that the wine was sold for $1 a gallon, or $275,000, and that the remainder of $75,000 represents the selling price of the winery.

Decisions will be entered under Rule 50.

Entered February 20, 1952.

[Endorsed]: T.C.U.S. Received Feb. 13, 1952.

The Tax Court of the United States
Washington

Docket No. 25439

GIULIO PARTICELLI,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Findings of Fact and Opinion entered February 20, 1952, the respondent herein filed a revised recomputation of tax on April 11, 1952, which was not contested when called for hearing on April 30, 1952. It appearing that such recomputation is correct, it is

Ordered and decided: That there is a deficiency in income and victory tax of $50,135.36 for the year 1943.

/s/ SAMUEL B. HILL,
Judge.

Entered May 1, 1952.

The Tax Court of the United States,
Washington

Docket No. 25440

ESTATE OF ELETTA PARTICELLI, Deceased,
ARTHUR GUERRAZZI, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Findings of Fact and Opinion entered February 20, 1952, the respondent herein filed a revised recomputation of tax on April 11, 1952, which was not contested when called for hearing on April 30, 1952. It appearing that such recomputation is correct, it is

Ordered and decided: That there is a deficiency in income and victory tax of $50,135.36 for the year 1943.

/s/ SAMUEL B. HILL,
Judge.

Entered May 1, 1952.

In the United States Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 25439

GIULIO PARTICELLI,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Giulio Particelli petitions for review of the decision of the Tax Court of the United States entered on May 1, 1952, ordering and deciding that there is a deficiency in his income and victory tax for the calendar year 1943 in the amount of Fifty Thousand One Hundred Thirty Five and 36/100 ($50,135.36) Dollars.

Petitioner resided in San Francisco, California when he filed his petition for redetermination in the Tax Court, and now resides in Santa Rosa, California. His income and victory tax return for the calendar year 1943 was filed with the Collector of Internal Revenue for the First District of California, in San Francisco, California. Petitioner on review files this petition for review by the Court of Appeals for the Ninth Circuit pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

Nature of the Controvery

The questions raised in this petition for review fall into two general categories. One category includes several questions relating to the scope of cross-examination permitted counsel for the Commissioner, over the vigorous objections of petitioner's counsel, whereby irrelevant matters were admitted into the record to petitioner's ultimate prejudice, and whereby the judge permitted the Commissioner's counsel to attempt to prove that petitioner had committed crimes of which he had never been formally charged or tried, and which were not a proper issue in this case, this attempt being for purposes of impeachment of petitioner as a witness. This category also includes improper consideration of hearsay evidence which was properly admissible only to establish and test the qualifications of an expert, but on which the Tax Court based findings of substantive fact which in turn form a necessary basis for the ultimate decision it reached.

The second category comprehends the substantive questions which will be raised. Petitioner sold his winery business, consisting of a winery and its entire inventory of wine. After preliminary negotiations, petitioner and the purchaser entered into a written contract of sale wherein the price of the winery was fixed at Two Hundred Seventy Three Thousand ($273,000) Dollars and the price of the wine at Seventy Seven Thousand ($77,000) Dollars. The contracting parties were unrelated strangers. Petitioner was under no compulsion to sell, and the buyer was under no compulsion to buy. All the buy-

er's subsequent acts, including entries on its books and in its tax returns, were consistent with the foregoing allocation of price. One question is whether the Commissioner and the Tax Court have authority to disregard the terms of the written contract in these circumstances, based entirely on the preliminary negotiations of the parties. Ultimately, this question is whether they can deny petitioner capital gains treatment of most of the profit he made on the sale of his business.

A second question in this category is the authority of Commissioner and Tax Court to allocate a selling price to the wine far in excess of its ceiling price. The Seventy Seven Thousand ($77,000) Dollar price allocated to the wine in the written contract of the parties was its ceiling price, fixed by the O.P.A. The question raised here is whether the Government, which fixed the maximum price at which the wine could be sold in ordinary transactions, which price would have been all the Government would have paid petitioner had it condemned the wine, can allocate a higher price to the wine for the purposes of increasing the tax petitioner must pay.

Respectfully submitted,

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Counsel for Petitioner on Review.

[Endorsed]: Filed July 21, 1952.

[Title of U. S. Court of Appeals and Cause 25439.]

NOTICE OF FILING PETITION FOR REVIEW

To: The Honorable The Commissioner of Internal Revenue, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that Giulio Particelli did on the 21st day of July, 1952, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated: July 21st, 1952.

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Counsel for Petitioner on Review.

Acknowledgment of Service attached.

[Endorsed]: Filed July 23, 1952.

[Title of U. S. Court of Appeals and Cause 25440.]

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Estate of Eletta Particelli, Deceased, through Arthur Guerrazzi, Executor, petitions for review of the decision of the Tax Court of the United States entered on May 1, 1952, ordering and deciding that there is a deficiency in the income and victory tax of said deceased for the calendar year 1943 in the amount of Fifty Thousand One Hundred Thirty Five and 36/100 ($50,135.36) Dollars.

Eletta Particelli resided in San Francisco, California, when she filed her petition for redetermination in the Tax Court, but she thereafter died and her estate and executor were substituted in her stead. Her income and victory tax return for the calendar year 1943 was filed with the Collector of Internal Revenue for the First District of California, in San Francisco, California. Petitioner on review files this petition for review by the Court of Appeals for the Ninth Circuit pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

Nature of the Controversy

This case is a companion case to that of Giulio Particelli, Tax Court Docket No. 25439, former husband of Eletta Particelli, deceased, and presents the same facts and issues. The two cases were consolidated for trial in the Tax Court and were dis-

posed of in a single opinion. The statement of the nature of the controversy in the petition for review in the case of Giulio Particelli is therefore repeated here.

The questions raised in this petition for review fall into two general categories. One category includes several questions relating to the scope of cross-examination permitted counsel for the Commissioner, over the vigorous objections of petitioner's counsel, whereby irrelevant matters were admitted into the record to petitioner's ultimate prejudice, and whereby the judge permitted the Commissioner's counsel to attempt to prove that petitioner had committed crimes of which he had never been formally charged or tried and which were not proper issue in the case, this attempt being for purposes of impeachment of petitioner as a witness. This category also includes improper consideration of hearsay evidence which was properly admissible only to establish and test qualifications of an expert, but on which the Tax Court based findings of substantive fact which in turn form a necessary basis for the ultimate decision it reached.

The second category comprehends the substantive questions which will be raised. Petitioner sold his winery business, consisting of a winery and its entire inventory of wine. After preliminary negotiations, petitioner and the purchaser entered into a written contract of sale wherein the price of the winery was fixed at Two Hundred Seventy Three Thousand ($273,000) Dollars and the price of the wine at Seventy Seven Thousand ($77,000) Dollars.

The contracting parties were unrelated strangers. Petitioner was under no compulsion to sell, and the buyer was under no compulsion to buy. All the buyer's subsequent acts, including entries on its books and in its tax returns, were consistent with the foregoing allocation of price. One question is whether the Commissioner and the Tax Court have authority to disregard the terms of the written contract in these circumstances, based entirely on preliminary negotiations of the parties. Ultimately, this question is whether they can deny petitioner capital gains treatment of most of the profit he made on the sale of his business.

A second question in this category is the authority of Commissioner and Tax Court to allocate a selling price to the wine far in excess of its ceiling price. The Seventy Seven Thousand ($77,000) Dollar price allocated to the wine in the written contract of the parties was its ceiling price fixed by the O.P.A. The question raised here is whether the Government, which fixed the maximum price at which the wine could be sold in ordinary transactions, which price would have been all the Government would have paid petitioner had it condemned the wine, can allocate a higher price to the wine for the purposes of increasing the tax petitioner must pay.

Respectfully submitted,

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Counsel for Petitioner on Review

[Endorsed]: T.C.U.S. Filed July 21, 1952.

[Title of U. S. Court of Appeals and Cause 25440.]

NOTICE OF FILING PETITION FOR REVIEW

To: The Honorable, The Commissioner of Internal Revenue, Bureau of Internal Revenue, Washington, D. C.

You Are Hereby Notified that Arthur Guerrazzi, Executor of the Estate of Eletta Particelli, Deceased, did on the 21st day of July, 1952, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated: July 21st, 1952.

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Counsel for Petitioner on Review

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed July 23, 1952.

[Title of U. S. Court of Appeals and Causes.]

Tax Court Docket Nos. 25439, 25440

STIPULATION FOR CONSOLIDATION

Whereas, the cases bearing the above designated docket numbers were consolidated for hearing by The Tax Court of the United States and there is only one official report of the proceedings had before The Tax Court and only one opinion covering both cases but a separate judgment or decision was entered in each case; and

Whereas, both cases are now pending in the United States Court of Appeals for the Ninth Circuit on petitions for review filed with The Tax Court by the petitioners;

It Is Hereby Stipulated and Agreed by the parties to the proceedings, by their respective counsel of record, subject to the approval of the Court, that, for the purpose of the appeals so pending, the cases may be consolidated prior to the docketing of the record but after the filing of the notices of appeal.

Dated: July 31st, 1952.

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Attorneys for Petitioners on Review
/s/ ELLIS N. SLACK,
Acting Assistant Attorney General
/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of Internal Revenue
Attorneys for Respondent on Review

ORDER OF CONSOLIDATION

It Is Hereby Ordered that the above designated cases be consolidated for briefing, argument and preparation of the record into a single proceeding with a single docket number, and that for the purpose of filing the record on appeal from The Tax Court of the United States the foregoing cases shall be consolidated into a single proceeding with a single record.

Dated: August 1, 1952.

WILLIAM DENMAN,
Chief Judge
HOMER T. BONE,
Circuit Judge
WILLIAM E. ORR,
Circuit Judge

[Endorsed]: T.C.U.S. Filed Aug. 6, 1952.

[Endorsed]: Filed Aug. 2, 1952. Paul P. O'Brien, Clerk.

The Tax Court of the United States, Washington

Docket Nos. 25439, 25440

[Title of Causes.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 63, inclusive, constitute and are all of the original papers and proceedings, including all original exhibits, (A-1 thru

I-9, attached to the stipulation of facts, Petitioner's exhibit 10, Respondent's exhibits J thru N, P, S and T thru Z, admitted in evidence, Respondent's exhibits AA and BB, admitted in evidence at the Deposition of H. L. Hotle and DD, admitted in evidence at the Depositions of John Dumbra and Victor J. Dumbra), on file in my office as the original and complete record in the proceedings before The Tax Court of the United States entitled: "Giulio Particelli, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 25439 and "Estate of Eletta Particelli, Deceased, Arthur Guerrazzi, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent Docket No. 25,-440", and in which the petitioners in The Tax Court have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 8th day of August, 1952.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk, The Tax Court of the United States

The Tax Court of the United States

Docket No. 25439

GIULIO PARTICELLI, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 25440

ESTATE OF ELETTA PARTICELLI, Deceased, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Court Room 421, Appraisers Bldg., San Francisco
Wednesday, May 17, 1950

Met, pursuant to notice, at 10:00 o'clock a.m.

Before: Hon. Samuel B. Hill, Judge.

Appearances: Valentine Brookes, Esq., 220 Montgomery St., San Francisco, Calif., appearing on behalf of Petitioners. Leonard Allen Marcussen, Esq. (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue) appearing for the Respondent. [1*] * * * * *

whereupon

GIULIO PARTICELLI

was called as a witness on behalf of the Petitioner,

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Giulio Particelli.)
and having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

A. Giulio Particelli. I live in Sebastopol, 476 South Main Street, Sebastopol.

Q. (By Mr. Brookes): Are you the Petitioner in this proceeding? A. Yes.

Q. Mr. Particelli, it is stipulated that 275,000 gallons of dry wine and the physical properties known as the Lucca Winery were sold in December to Tiara Products Company by one Giulio Particelli. Are you the Giulio Particelli who made that sale? A. Yes.

Q. Prior to that sale, what was the business in which you were engaged? A. Engage?

Q. What was the business, Mr. Particelli, in which you were engaged?

A. In the wine business.

Q. What did you do in that business? [17]

A. Oh, I just make wine and sell. I buy wine from some other winery, old wine, and I put in bottle. I cannot put in bottle my wine.

Mr. Marcussen: I didn't understand the last statement.

The Witness: I buy wine from some other wineries——

Mr. Brookes: Will you repeat your answer?

The Witness: I make some wine every year. In my wine, I can't put no in bottle of my wine because it is too young and dry wine got to be aged.

(Testimony of Giulio Particelli.)

Also I put in bottle some wine I bought from Italian Swiss Colony, from Geyserville Growers, and I sent them to groceries—to bar.

Mr. Marcussen: You said something about you can or can't in the early part of your statement with respect to your own wine. Was it 'can' or 'can't'?

The Witness: I can't because it's too young.

Mr. Marcussen: You can't put your own wine in Bottles because it's too young so you say you bottle for other people?

The Witness: I bottle below my name because I buy the wine from some other people.

Q. (By Mr. Brookes): What type of wine did you buy from other persons?

A. Sauterne wine; Sherry, Port, Muscatel, Burgundy, Sauterne.

Mr. Marcussen: If your Honor please, I would like [18] to ask your Honor to make it clear to the Reporter that if there is the slightest doubt about what the witness says, he should interrupt these proceedings so he is certain to get it correctly in the Record.

The Court: Yes, it is important that we get a correct Record and if you have any difficulty following the enunciation of the witness, make it known and we will try to get it in there right.

Mr. Marcussen: It doesn't matter how often you do that; it must be correct.

Q. (By Mr. Brookes): Mr. Particelli, I ask you to cast your memory back to the year 1943. What

(Testimony of Giulio Particelli.)

were the months in 1943 in which you crushed into wine the grapes which you purchased that year?

A. Oh, started in September, October, and a little bit in November.

Q. Prior to those months, were you—in 1943—were you engaged in selling wine?

A. If I am engage?

Q. Were you selling wine, did you sell wine prior to the 1943 crush?

A. Yes, I sold the wine.

Q. Do you remember the price ranges at which you sold your wine, prior to September, 1943?

A. My wine? [19]

Q. Your wine, as well as the wine which you purchased from others and re-sold?

A. Well——

Mr. Marcussen: In bulk or bottle?

Mr. Brookes: If the answer doesn't come out, I will ask.

Q. (By Mr. Brookes): Will you continue?

A. We have a quite a few crush. The one I buy from Italian Swiss Colony is a high grade wine, and it's a high price I sold. Wine I bought from Petri Wine is a little more cheap; I sell a little more cheap, and the wine I bought from Geyserville Growers and other wineries also different price, and my wine is cheap. My wine I sell, this the cheaper wine, I haven't, because no finished wine. I have no cooler, I no have any pasteurize; I have just one little filter and I can't put in no bottle because it no good after 4, 5 days in bottle.

(Testimony of Giulio Particelli.)

Q. What was the price range at which you sold the Italian Swiss Colony Wine?

A. Oh, we have some blend, sweet wine, one price; $1.25, $1.20.

Q. Are these figures a gallon?

A. By gallon, everything in gallon—$1.40.

Q. And did you carry any Italian Swiss Colony dry wines? A. Yes. [20]

Q. What was the price range?

A. Some $1.10, 90 cents, 75 cents.

Mr. Marcussen: Bottled or bulk?

The Witness: In bottles.

Mr. Marcussen: But in some quantities of one or two gallons?

The Witness: Oh, lot buy just one gallon a week.

Mr. Marcussen: Again I want to explain to your Honor and also to Counsel, I will ask your indulgence as I go along. Otherwise, I would have to have a verbatim transcript before me, entirely apart from the things I didn't understand. So if you will indulge with me?

Mr. Brookes: You may assume I have no objections until I state my objections.

Mr. Marcussen: Very well. Thank you.

Q. (By Mr. Brookes): Did you sell any of the Italian Swiss Colony wine in bulk quantities?

A. No.

Q. Did you have a retail license? A. Yes.

Q. Were these prices which you indicated a moment ago the prices that you charged at retail or at wholesale? A. Wholesale.

(Testimony of Giulio Particelli.)

Q. What was the price range at which you sold the wine [21] you bought from Petri and re-sold?

A. Oh, dry wine—it was sold for 45 cents up to 65 cents.

Q. Is that a gallon? A. A gallon.

Q. Was this sale in bulk? [21-A]

A. In gallon.

Q. In gallon lots? A. Yes.

Q. And what was the price range at which you sold the wine which you acquired from Geyserville Growers? Is that the name?

A. Geyserville Growers, the same as Petri.

Q. And what was the price range both in bulk and in gallon quantities at which you sold your own wine, in 1943, prior to the September crush?

A. Like I say, I no pour my wine—I no pour my wine in gallons because no finish wine and if I do pour in gallon, they turn cloudy and people don't buy from me any more. Only thing I can sell my wine in bulk—10 gallon barrel, 5 gallon demijohn, 25 gallon, but I can't put in bottles no unfinished wine.

Q. Now, I asked you, Mr. Particelli, also what the price range was at which you sold your own wine in bulk prior to September, 1943?

A. If we buy 50 gallon barrel we sell them at 32c at this time; 25 gallon barrel, sell 34c, 35c; and if you buy 5 gallon demijohn, we sold 38 to 40.

Q. Did those prices which you have quoted include the Federal and State tax?

A. State tax and Federal.

(Testimony of Giulio Particelli.)

Q. In other words, you did not add the tax to the prices [22] which you have just quoted?

A. It is included, tax and all.

Q. Did you have any of your wine from the 1942 crush left in October of 1943?

A. A little bit.

Q. How much?

A. Oh, I can't remember exactly how many thousand gallons I have; not very many.

Q. Prior to the completion of the 1943 crush, in October of 1943—excuse me; in November, you said, of 1943, was most of the wine sold by you the wine which you made yourself, or was most of it that which you purchased from others?

A. Most of the one I buy from the other one.

Mr. Marcussen: Prior to what date was that?

Mr. Brookes: The completion of the 1943 crush which he testified was in November, 1943.

Mr. Marcussen: Prior thereto, his sales were largely——

Mr. Brookes: Mostly of wine purchased from others is what the witness said.

Q. Mr. Particelli, as I stated before, it is stipulated in this case that in December, 1943, the wine and the physical properties of the Lucca Winery, your winery, were sold to the Tiara Products Company. The exhibit 1(a), which the parties have stipulated to, is the agreement of sale between yourself and one John Dumbra. Had you known John Dumbra before this [23] transaction?

A. I never saw him before.

(Testimony of Giulio Particelli.)

Q. Was he related to you? A. No.

Q. Before this transaction, had you known anyone connected with Tiara Products Company?

A. No.

Q. Was anyone connected with Tiara Products Company related to you? A. No.

Q. Was the wine which you sold in December, 1943, to Tiara Products Company entirely the wine which you had made yourself? A. Yes.

Q. Was it entirely of one type; that is, dry or the other? A. It was all dry.

Q. All dry. By that do you mean it was all of the type which contained not more than 14% alcohol? A. What?

Q. I think the witness does not understand me. Did the wine contain more than 14% alcohol?

A. No.

Q. Was it all less?

A. Most all of my wines contain between 11 and 12.

Q. And the wine which you sold to Tiara?

A. Between 11 and 12. [24]

Q. When had this wine been made?

A. It was made during the crush in 1943.

Q. Was there some small quantity which was carried over?

Mr. Marcussen: I object to that as leading, your Honor.

The Court: He said there was some quantity left over. I think it is all right.

Q. (By Mr. Brookes): Was any of the 1942 crush, of the wine of the 1942 crush, included in the

(Testimony of Giulio Particelli.)

wine which you sold to Tiara? A. Yes.

Q. About how much?

A. I say I don't remember; many thousand gallons—very little.

The Court: You don't remember how many thousands, is that it? The Witness: Yes.

Q. (By Mr. Brookes): Did I understand you to say very little? A. Very little.

Q. At the time of the sale of the wine to Tiara Products Company, was the wine ready for bottling? A. No.

Q. Was it ready for use as table wine?

A. I have no rack yet. [25]

Q. What would you have had to do to this wine to make it ready for sale in bottles as bottled table wine?

A. First I have to get the rack and take off all this lees, put in some other tank and you get it clarified. Put some stuff inside, chemical stuff, and have a set down and a rack again, and then you got the filter. You have got to have a good filter if you want to put in bottle.

You have to have a cooler. You have to have it pasteurized and pretty good finish, because you guarantee the wine so it would be sold in gallon.

Mr. Brookes: Mr. Reporter, will you read back that answer, please?

(The last answer was read by the reporter.)

Q. (By Mr. Brookes): Is that correctly stated?

A. Pasteurized in cooler.

Mr. Marcussen: Pretty good what?

(Testimony of Giulio Particelli.)

The Witness: Finishing filter.

Q. (By Mr. Brookes): Mr. Particelli, is that process of readying the raw wine for the bottling known as finishing? A. What?

Q. Is that process of making raw wine ready for bottling known as finishing the wine?

A. Like I explained before, if the rack won't take it [26] from the other, you have got to clarify it, and the cooler and pasteurize; filter three, four times.

Q. Did you have a bottling plant?

A. Yes, I have a little bottling plant, no by the winery, about a block farther away.

Q. What type was it?

A. Just a—we bottle by hand and by hose, and if I bought a little machinery—we just fill up 6 bottle at a time and put the wine inside the machinery and we fill the bottle.

Q. Did you have a pasteurizer? A. No.

Q. How many thousands of gallons would your cooperage hold for aging purposes?

A. Oh, I can't remember exactly. About 270,000, something like that.

Q. Was your cooperage filled at the time of sale with the wine that you have described?

A. Yes.

Q. Did you have any other cooperage available to you in which you could have aged it further?

A. No.

Q. Was there any way of settling the sediment in the wine other than by aging in cooperage or by pasteurizing?

(Testimony of Giulio Particelli.)

A. Well, if I have a pasteurize, I can finish.

Q. There is no other way of doing it?

A. No other way.

Q. In December of 1943,—strike that. Prior to December [27] of 1943, had you ever purchased finished wine for the purpose of blending with your own unfinished wine? A. Yes.

Q. From whom had you purchased the finished wine that you used in this way?

A. I purchased from Geyserville Growers, Petri Wine, Italian Swiss Colony.

Q. In December, 1943, were you able to buy any more finished wine from these wineries?

A. No in bulk.

Q. Had you tried? A. Yes.

Q. Had they refused to sell finished wine to you altogether?

A. Just in case goods, in bottles.

Q. What size bottles?

A. Gallon, half-gallon, and quart.

Q. At what prices?

A. I can't remember how much it was.

Q. Could you have used this wine so purchased in gallon and half-gallon bottles for blending with your own wine? A. No, I can't.

Q. Why not, Mr. Particelli?

A. Cost me too much money.

Q. Mr. Particelli, the record which has been stipulated [28] to exist shows that the cost of the grapes to you which you purchased in 1943 and crushed in 1943, that the purchase price of the grapes was

(Testimony of Giulio Particelli.)

greater than the $77,000 for which you sold this wine. Why did you pay so much for the grapes?

A. Well, everybody is paying this price and everybody—we think the O.P.A., they going to raise its price after we finish crushing.

Q. Did you pay any more for the grapes than you had to, to get them? A. No.

Mr. Marcussen: Object to that as leading, if your Honor please.

The Court: Well, it is leading. I think we will have to indulge a little in leading here because of this witness.

Mr. Brookes: I will withdraw the question. Perhaps I can do better.

Q. Did you buy the grapes as cheaply as you could? A. Naturally, I tried.

Q. Do you know whether other wineries were paying this same price for grapes?

A. All I know everybody paid the same.

Mr. Marcussen: He hasn't testified to what he paid, has he, Counsel?

Mr. Brookes: That is stipulated in the facts agreed to. [29]

Mr. Marcussen: You mean it's stipulated in a lump sum?

Mr. Brookes: We don't have the tonnage, I think.

Mr. Marcussen: If you want to bring that out——

Mr. Brookes: I have no desire to bring it out. I am satisfied with what we do have. I am not interested in what he paid per ton.

(Testimony of Giulio Particelli.)

Q. Mr. Particelli, will you describe in your own words the events which lead to the agreement of sale which has been stipulated to, between yourself and John Dumbra?

A. Well, like I say, I never seen Mr. Dumbra before, and I am down south in Fresno for a couple of days. When I come home, my daughter tell me some man is coming, in the office, and they want to buy some wine and they say he is down to Santa Rosa in a hotel and he is call him up again. They call him up again the morning to see if you home and I told him I expect you later tonight. And I come home around 6 o'clock in the night and as soon as I reach home, the dinner on the table and I sit down and started to eat and the time my daughter try to explain to me about this man, the telephone ring and my daughter say, "I betcha this man see if you come home yet."

I answer and the Mr. Dumbra I ask what he wanted and he said, "I want to buy some wine from you."

I said, "all right, come up tomorrow morning, see if we can do some business." [30]

Mr. Marcussen: I beg your pardon, all right 'what'?

A. "All right, you come up tomorrow morning. I be home."

He say, "Why don't you come down tonight, meet me. I am down in the Santa Rosa Hotel, and it don't take long to have dinner and talk over."

And then finally I decide to go and I meet there.

(Testimony of Giulio Particelli.)

We go down to the bar and have a drink and a high-ball and we start to talk about buy wine, how much wine I have on hand, and if I want to sell them. And I say, "If I do sell, I be disgusted because of the ceiling price, but if I do sell, I want to sell all the wine I have on hand," and they ask me, "How much you asking?"

Well, as I said before, "You know pretty well; I can't ask you more than ceiling price because I don't want to go to trouble and you coming up and see the inventory. If you want to buy all, I sold to you for the ceiling price because you got to take the bum and good, all wine in the winery, lees and everything; otherwise, I no sell."

Well, he said, "I come up tomorrow morning," and they coming up next morning. I showed the inventory; I showed each tank, how much—how much alcohol in each tank. I write it down how much alcohol because I have to report to my chemist in Berkeley, and he said, "All right, I buy all."

And when we—, "Before you buy all, I got to go down to the City and see my accountant and see how much the ceiling [31] price correct, because one says one price and one says the other. I don't want to go in trouble. If you want to come down tomorrow I go down in the City."

"All right, for the ceiling price, I take over," and we come out to the winery, out in the yard, there look all over my place and say, "You have a nice little winery, 2 switches right on the tracks, one in back, one in the front."

(Testimony of Giulio Particelli.)

Mr. Marcussen: Who said this?

A. He says new winery.

Mr. Marcussen: Who said?

A. Dumbra. And he said, "You don't want to sell the winery too?"

He asked me if I want to sold the winery. "It's all right if you want to pay the price for it," and he says, "How much you want?"

I say, "You don't want to buy him. I don't care if I sell anyway."

He say, "How much you wanted?" I wanted $300,000.

He says, "Too much money."

Well, we leave it there, and we come down the next morning in Montgomer, to my accountant, George Oefinger, and the time we be down there in the office, they ask me again if I want to sell the winery. I say, "I tell you if you want to buy," and they told him, "No, well, they think it over."

So I thought about it. "I give you $273,000." [32]

I think over a little bit. "That's all right," and we told them to draw two deals, one for the winery, and one for the wine and that is all we do.

Q. (By Mr. Brookes): Mr. Particelli, did you have advice from anyone that when you sold the wine, if you also sold the winery, you had to observe the ceiling price for the wine?

A. I have to what?

Q. Did you have advice from anyone that you

(Testimony of Giulio Particelli.)

had to observe the ceiling price for the wine in this sale?

A. Everybody know we got to sell by the ceiling price.

Q. Were you advised by anyone that the ceiling price also applied to the sale of the wine, if you also sold the winery?

A. Well, they have nothing to do about the winery, the ceiling price and the wine.

Mr. Brookes: That concludes my examination in Chief, your Honor.

The Court: You may cross examine.

Mr. Marcussen: May we have about a 10 minute recess?

The Court: We will have about a 10 minute recess.

(Whereupon a short recess was taken.)

Cross Examination

Mr. Marcussen: If your Honor please, I am rather embarrassed. I don't seem to have brought my notes with me for the cross examination of this witness. I would like to proceed [33] with the cross examination and wonder if I might be permitted to continue the cross examination after lunch?

The Court: All right, go ahead.

Q. (By Mr. Marcussen): Mr. Particelli, did you purchase revenue stamps from time to time for placement on your bottles and on the other wine that you sold? A. Yes.

Q. When you sold out to Tiara Products Com-

(Testimony of Giulio Particelli.)

pany, did you have any stamps left?

A. I don't remember. You will have to ask my daughter because she is the one that keeps the office.

Q. Well, ordinarily, how did you purchase your stamps, from time to time as you needed them?

A. My daughter goes down to Santa Rosa.

Q. I know, but you are in the business of selling wine and you have to purchase stamps?

A. Yes.

Q. That is a very important part of the wine business, isn't it, selling wine?

A. My daughter does.

Q. That is a very important part of the business, isn't it?

A. Oh yes, you can't sold no wine without a stamp.

Q. Now, you purchased those stamps from time to time, [34] didn't you?

A. My daughter did.

Q. She did it for you? Is that correct.

A. Yes.

Q. And did you purchase stamps both for retail sales and wholesale sales in your store and also for bulk sales? A. That's right.

Q. All this time, do you mean to say you don't know how the stamps were purchased?

A. No, because she is the one that was taking care of it.

Q. Who put the stamps on there?

A. My son-in-law, and my daughter.

(Testimony of Giulio Particelli.)

Q. Both of them purchased those stamps from time to time? A. Yes.

Q. Prior to this sale, what was your financial position, prior to this sale?

A. You mean when I sell it in——

Q. Tiara? A. Over $75,000 to the bank.

Q. Owed $75,000 to the bank?

A. I owed $75,000 to the bank.

Q. And you—and those were borrowings that you made in connection with your business, is that correct? A. Yes.

Mr. Marcussen: I ask, Counsel, do you propose to call [35] the daughter as a witness in this case?

Mr. Brookes: Yes.

Q. (By Mr. Marcussen): Generally, you don't know whether you purchased these stamps from time to time as needed for the sales, or whether you kept quite a few stamps on hand, is that correct?

A. No.

Q. Did you have any idea? A. No.

Q. You wouldn't know whether you had, say, $100 worth of stamps, or $200 worth of stamps?

A. No, because I leave everything to her to do.

Q. If you owe $70,000 to the bank, do you from time to time keep track of your finances?

A. I paid interest every month. My daughter is taking care of it too.

Q. So you had to be quite careful of your expenditures, did you, from time to time?

A. What?

Q. Did you find it necessary to go rather care-

(Testimony of Giulio Particelli.)

fully about what money you spent from time to time? A. Yes.

Q. So you didn't spend more for things you didn't need?

A. Sure.

Q. Would that refresh your recollection one way or the [36] other as to whether you had a lot of stamps on hand or not?

A. I don't know if we had a lot of stamps on hand or not.

Q. You don't know?

A. No.

Q. Do you have any records?

A. My daughter keeps records.

Q. I ask you, do you have any records?

A. No.

Q. What happened to your records?

A. My records—burn them up.

Mr. Brookes: Your Honor, I think that I have to object to any further continuation of cross examination beyond the scope of the direct. If Counsel wishes to make Mr. Particelli his witness, naturally he is free to do so.

The Court: It doesn't make much difference. He would be an adverse party and wouldn't be bound by his answers anyway.

Mr. Marcussen: Exactly. He is the tax payer in the case and it seems to me the scope is almost limitless.

The Court: I will overrule the objection.

Q. (By Mr. Marcussen): Will you tell the

(Testimony of Giulio Particelli.)

Court how it came about the records were burned?

A. Well, when—after I sold the wine and go out of the business in Forestville, I bought a little farm in Rincon [37] Valley, the other side of Santa Rosa 4 miles, and I—they have no house on this ranch, 10 acre ranch. It used to have an old barn, and a little cabin.

Q. This is where the winery is?

A. No, after I sold the winery in Forestville, I move to Rincon Valley, and I move everything I have down in Forestville including my records, paper, and I put everything in the old barn down there.

Q. By everything, do you mean all of your records and everything? A. Everything.

Q. Pertaining to the operation of your business?

A. Everything I bring down there in the Rincon Valley and I fix up a little cabin for live in myself. My daughter, my wife, my son-in-law live in the City, and I started to build a house.

Q. You were building it?

A. No, carpenter; I have 2 or 3 carpenters, and I live in a little cabin, and after the house is finished, I want to clean up the barn and I thought, old man, Dante Culici——

Q. Where is he now?

A. He is dead, 3 years ago, in Santa Rosa. He work over 2 years for me, and I told Dante, said, "You clean up the barn and burn up all this stuff you find no good for nothing," and I go in Santa Rosa to order some lumber. [39]

(Testimony of Giulio Particelli.)

Q. I didn't get that?

A. I told him to clean up the barn and straighten up all this paper and everything, there together, and burn the one is no good.

Q. And what?

A. Burn them up, the one that is no good and I got to go in Santa Rosa to order some lumber for my house; and the time I go to Santa Rosa when I come back they have burned everything, all my records, everything I have in the winery, they burn everything.

Q. How did he know what papers were no good and what papers were good?

A. I told him, if you find some boxes all packed up, not touch.

Q. And you had the winery records all packed away in boxes? A. Yes.

Q. And so Dante, here, comes along and burns the whole works up, is that it?

A. Yes, that is what happened.

Q. Did you have those papers separated from the other papers?

A. It was all together when we moved.

Q. You didn't even separate them?

A. When we moved, we put them all down in the barn [40] together.

Q. Now, did you ever have any chicken coops, Mr.—— A. ——chicken?

Q. Particelli?

A. You mean if I have any chickens?

Q. Did you ever have any chicken coops or small

(Testimony of Giulio Particelli.)

buildings on your business establishment there?

A. In Rincon Valley?

Q. Any place?

A. No, I have a little chicken house at home in the Rincon Valley. I just raise a few chickens for my own use.

Q. What other buildings were there on your property there, the Rincon Valley property?

A. Oh, the house, and the chicken house, and the pump house and the barn.

Q. Did you ever have a chicken house burn up on you? A. No.

Q. You never did?

A. In the Rincon Valley, you mean?

Q. Any place, any chicken house any place?

A. I have one burn up in Forestville about 20 years ago.

Q. 20 years ago? A. Yes.

Q. Did you collect some insurance on that?

A. Yes. [41]

Mr. Brookes: Your Honor, isn't the examination of witnesses in this case intended to be confined to the issue before the Court?

The Court: Yes, I don't know if the 20 years back would be very material.

Mr. Marcussen: I have some other purpose, and the witness has testified here that his records were burned and I wish to impeach him, if your Honor please, by showing a series of burnings, and I think it is material to show that this Witness is in the habit of having fires.

(Testimony of Giulio Particelli.)

The Court: All right, I will overrule it.

Q. (By Mr. Marcussen): Now, did you ever have any other fires?

A. Yes, my house burn up in 1930.

Q. Your house? A. In Forestville.

Q. In Forestville? A. Yes, sir.

Q. Do you know anything about how that came to burn?

A. I don't. I been down town there; when we reach home, everything in fire.

Q. Did you collect your insurance on that?

A. Yes.

Q. Now, did you have any other fires?

A. Have a little store on the highway burn up; my daughter [42] handle the store.

Q. What year was that?

A. I think in 1934.

Q. Wasn't it in 1935?

A. I don't know; I don't remember.

Q. You don't know, and did you get the insurance on that?

A. Just a little insurance we had on it.

Q. It was just a small place, wasn't it?

A. Yes.

Q. Small place of business?

A. Just to sell wine and beer.

Q. Sell wine and beer on the road side there?

A. In the highway.

Q. Did you live in there too?

A. I sleep night in the time we run the business, not in the winter time.

(Testimony of Giulio Particelli.)

Q. What did you do after that fire?

A. Oh, I have a shoe store in Sebastopol—shoe repair.

Q. After your road side stand—now, did you get your insurance on that building on the road side there? A. Yes.

Q. Did you rebuild it? A. No.

Q. You didn't go into that business again, did you?

A. It was started, we started to sell the wine down in [43] home—in the ranch.

Q. At another place? A. In the ranch.

Q. Yes. A. When we leave it.

Q. At your ranch? A. Yes.

Q. Did you have the ranch at the time you had the roadside place? A. Yes.

Q. Now, were there any of your records that were not destroyed?

A. My records is all destroyed down in Rincon Valley.

Q. All destroyed down in Rincon Valley?

A. That is what I think.

Q. Your intention was to remove everything from the winery and take it down to Rincon Valley, was it? A. In the barn, yes.

Q. Did you have a home at that time?

A. In Rincon Valley?

Q. Any place? A. No, I been sold.

Q. You sold that with the winery? A. No.

Q. Where were you living at the time you sold the winery? [44]

(Testimony of Giulio Particelli.)

A. I live in Forestville, and that time I had a home.

Q. You had a home? A. Yes.

Q. And you had the home after the sale too, is that correct? A. Yes.

Q. And you didn't consider the possibility of taking your records to your home, did you?

A. I have a home?

Q. Yes.

A. But after I sold my home, I moved down to Rincon Valley.

Q. You sold your home also after you sold your winery to Tiara Products?

A. Pretty near 2 years after.

Q. 2 years after? A. Yes.

Q. When did you remove the records from the winery?

A. As soon as I sold the business, and the grocery business in Forestville, we take everything home down to the ranch.

Q. And then a year and a half later?

A. I sold the ranch.

Q. You sold the home. Why didn't you take your records to your home, Mr. Particelli, instead of putting them in the barn? [45]

A. I didn't have no home down on Rincon Valley.

Q. I see.

A. I had a little cabin and the barn there, and I sleep there.

Q. You would rather have the records out at the barn, rather than where you live?

(Testimony of Giulio Particelli.)

A. I didn't have a home in Rincon Valley, I just build a home.

Q. Where was your home?

A. It was no place; I had a little cabin.

Q. Didn't you testify that you had a home in Forestville at the time you sold the winery?

A. After I move from my home in Forestville and after I sold the winery, I also sold my ranch and I got to give the possession of the ranch and I got to move everything to Rincon Valley and to the other ranch I have there, and down there I don't have no home.

Q. Will you please listen carefully and check me whether my understanding of your testimony is correct. At the time you sold the winery in December of 1943, you had a home in which you lived at Forestville, correct?

A. One mile from Forestville, yes.

Q. And after you sold the winery, you bought a place down at Rincon Valley where you had a barn, is that correct? A. Yes. [46]

Q. And after you sold the winery, immediately after, is that it? A. No, no.

Q. When? A. About a year and a half.

Q. A year and a half?

A. Pretty near a year after I sold the winery.

Q. More than a year afterward? A. Yes.

Q. Then you left your records—you mean to say you left your records there at the winery?

A. After we close the winery and after I give the key for Mr. Dumbra before I move on over to

(Testimony of Giulio Particelli.)

my ranch in the home in Forestville.

Q. In your home? Is that what you testified to a moment ago? Didn't you say you moved up to the barn?

A. After I sold the ranch a year, after I sold the ranch then I move down in Rincon Valley in the other ranch.

Q. When you sold the Forestville ranch, did you buy another house?

A. No, I bought this little ranch down to Rincon Valley.

Q. What was on that ranch?

A. Just a barn and a little shack.

Q. A little shack?

A. And the old house. [47]

Q. And an old house? A. Yes.

Q. Where did you live?

A. I live in the little shack.

Q. Who lived in the old house?

A. Nobody, because no good for living and I want to fix it.

Q. I see. Now, how long was the little shack?

A. Oh, I think about 14 by 18, and I have a little kitchen and I haven't any bedroom.

Q. I see. Did anybody else live there with you?

A. No.

Q. Now, after you sold the winery property and the wine, what did you do?

A. I bought this ranch down in Rincon Valley and I started building this little home.

Q. Did you participate in the building of that?

(Testimony of Giulio Particelli.)

A. I had carpenters do it and I helped.

Q. I want to know what did you do by way of work? How did you spend your time?

A. Down on the ranch.

Q. Did you buy that ranch immediately after the sale?

A. After I sold the one I have in Forestville, I bought the other right away.

Q. That was a year and a half after? [48]

A. And before I had my ranch in Forestville, I worked in the ranch.

Q. You worked on the ranch? A. Yes.

Q. How many acres do you have on that ranch?

A. Forestville?

Q. Yes. A. 50.

Q. Did you have any other ranches at that time?

A. I have a couple acre here in Forestville, just pasture.

Q. The 50 acre ranch, what is on that?

A. Oh, some grapes, peaches, prunes, just for home use; most vineyard.

Q. You also said apples, didn't you?

A. Apples.

Q. How many acres of vineyards?

A. Oh, between vineyard and apple and cherry cultivation, around 20 acres.

Q. A total of 20 acres under cultivation?

A. Yes.

Q. And how much of that was vineyards?

A. It's all together. I have the fruit between the vineyard, you know.

(Testimony of Giulio Particelli.)

Q. So you can't very well make an estimate of that, is that correct? [49]

A. Just a little bit grape.

Q. How many tons of grapes did you get from that in 1943?

A. Oh, I don't think we take off about 15, 18 ton; I forget how many, really.

Q. About how many in the year before, in '42?

A. Well, no quite as much because lot of new vineyards come up. I plant a little bit, little by little by myself.

Q. You estimated 15 or 18 tons in '43. How much would you estimate in '42?

A. Maybe about 12 ton, 13.

Q. Yes.

A. I don't know; I don't remember.

Q. Now, did you have any other ranches beside this ranch? A. No.

Q. And the other 2 acres was pasture land, you say? A. Pasture land.

Q. All right. Now going back to December, 1943, after you made the sale, how did you spend your time, what work did you do?

A. I say I worked in the ranch in Forestville.

Q. What other work did you do?

A. Just work on the ranch.

Q. In the ranch? A. Yes. [50]

Q. Did you do any work on the winery?

A. I work in the winery until I gave the key to Mr. Dumbra.

Q. When did you give him the key?

(Testimony of Giulio Particelli.)

A. First of May.

Q. First of May, and between December and the first of May, that is between December 6, all of December and the first few months of 1944 up until May 1, what did you do in the winery?

A. I used to go, and do nothing, and after we make the deal, I started to ship wine in New York for Mr. Dumbra.

Q. Was that a part of your agreement with Mr. Dumbra?

A. Why, if I want to stay there and help, I have a man work—helped the man, he is paid for to fill him up with the wine and ship to him.

Q. And so you handled all the shipments for Tiara up until May 1, is that correct?

A. Until May 1st.

Q. Did that occupy a good share of your time during that period?

A. If you want to keep it clean; if you want to keep the tank full and if you want to take care of the winery, you know.

Q. Do you have to clean the tank cars?

A. If you draw one tank, if you don't want to, you have to go inside and polish. [51]

Q. That is the tank, the cooperage; you have to go in there and clean them up?

A. After your wine is gone.

Q. When you get the cars delivered to you like that, are they clean or dirty?

A. You have to wash them out.

Q. Did that take a good deal of time?

(Testimony of Giulio Particelli.)

A. Take about 3 or 4 hours; depends on how they come.

Q. About 3 or 4 hours? A. Yes.

Q. And how many tanks would you say that you filled for them during that period of time from December to the end of April?

A. I don't know; I ship, I don't remember how many tank cars full.

Q. What proportion, would you say, of the wine?

A. Sometimes they send me 2 cars to fill up in one day; sometimes they stay 2, 3 days and never send one.

Q. By the way, what capacity were these cars?

A. 8,000; 6,000 gallons.

Q. What were most of them?

A. Mostly 8,000 thousand gallons.

Q. Are you sure? A. Eight.

Q. Weren't most of them 6,000? [52]

A. Yes.

Q. But they varied between 6 and 8,000, is that correct? A. Yes.

Mr. Marcussen: Now, if your Honor please, I have just asked Counsel whether he would stipulate with me that A. M. Mull, Jr., is an attorney at Sacramento, California, and that he was the attorney for Tiara Products Company in closing this purchase transaction for the winery and the wine, and that he was also Tiara's attorney in fact to handle the business details connected with that closing, such as paying bills and arranging to have work done for them at the winery; and arranging

(Testimony of Giulio Particelli.)

to have Mr. Particelli receive all that was coming to him and all of the various business incidentals connected with the closing of such a transaction of that kind. Is that stipulated, Counsel?

Mr. Brookes: So stipulated.

Mr. Marcussen: If your Honor please, I have here Respondent's Exhibit J for identification, and I ask Counsel to stipulate that this is a tabulation entitled Lucca Shipments; parenthetically Lucca Winery is the name of the winery and that it is a statement of shipments beginning with a shipment on—I beg your pardon. Yes, it is a statement of shipments beginning on January 10, 1944, and showing shipments down to April 14. It shows a total shipment of 183,369 gallons and it identifies the tank cars and their capacity; and I will ask [53] Counsel to stipulate that that statement is such a statement and that it was received from the files of Mr. Mull, as attorney at law and attorney in fact for Tiara Products Company.

Mr. Brookes: Petitioners stipulate that the paper is what it is represented to be and that it was found in the file. Did you identify the file?

Mr. Marcussen: Yes, Mr. Mull's file for Tiara Products.

Mr. Brookes: It was found in that file?

Mr. Marcussen: Very well. For the purpose of the Record, I call your Honor's attention to the file and that is a total of approximately 27 shipments, and I think approximately 17 show a capa-

(Testimony of Giulio Particelli.)

city of slightly over 6,000 gallons. I offer that in evidence as Respondent's Exhibit J.

The Court: Admitted.

(Whereupon the document marked Respondent's Exhibit J for identification was received.)

Q. (By Mr. Marcussen): What else did you do besides making arrangements for the shipments of the wine to Tiara or at its order?

A. Nothing.

Q. You didn't do anything? A. No.

Q. Did you make outlays for them in money to pay people for services performed?

A. Who? [54]

Q. Did you pay the bills for them, for Tiara?

A. No, the banker paid.

Q. The bank? A. The bank of Sonoma.

Q. Didn't you pay bills around the winery?

A. Small bills and the total the bill to the bank and Mr. Mull sent them the money.

Q. Mr. who?

A. Mull. My daughter taking care of all this.

Q. Did you agree with Tiara Products Company to handle some of the details like the payment of the telephone bill and other incidental charges that arose at the winery?

A. If I call them up for his attorney, I charge him the call for. My daughter taking care of all this.

Q. I hand you Respondent's Exhibit K for identification which is a sheet of paper containing a

(Testimony of Giulio Particelli.)

certain tabulation thereon, and it's on a piece of stationery entitled, "Lucca Winery, Wholesale Producers of all kind of high grade wines, at reasonable prices," and there is other information on the heading there, and I ask you to look at the tabulation contained there and ask you to state what that is, if you know?

A. There is one here, Orsolini, the man working for me.

Q. Arthur Guerrazzi is the next one showing a payment of $43.32, and he is your son-in-law?

A. Yes. [55]

Q. The gentleman sitting there. The first one to Orsolini, that is in the amount of $35.00?

A. He used to work for me before.

Q. You paid him that money, did you?

A. Yes.

Q. And did you make all these payments here that are listed on that? A. My daughter.

Q. Were they paid out of your funds?

A. Yes.

Q. In your money? A. Yes.

Q. And what were they for?

A. For work.

Q. For working there? A. Yes.

Q. Who were they working for?

A. Maybe shipping wine for Mr. Dumbra.

Q. So it does appear that you did make payments from time to time, and they refunded to you? A. Yes.

Q. That is correct, isn't it? A. Yes.

(Testimony of Giulio Particelli.)

Mr. Marcussen: I offer this as Respondent's Exhibit K in evidence, if your Honor please. I call your Honor's [56] attention at the foot of the page. It shows total payments of $1,243.26 through March 31, 1944, and that the last statement on the page is that this does not include Mr. Particelli's work.

The Court: Admitted.

(Whereupon the document marked Respondent's Exhibit K for identification was received.)

Q. (By Mr. Marcussen): Now, what were you paid for your work, Mr. Particelli?

A. He paid me so much a day.

Q. A day? A. Yes, so much a month.

Q. A month? A. Yes.

Q. Which is it now? What was your rate of pay?

A. Well, I told you, if I work for you one month and during the shipping I said I want to be paid.

Q. I have no doubt of that. I just want to know how much you were paid, Mr. Particelli?

A. I forget how much they give me. I don't remember. I left it to him how much he give me.

Q. Didn't you have an agreement with him?

A. No.

Q. Didn't you have an agreement with him that you were to get $100 a month?

A. No, I don't remember if I do. [57]

Q. You would not say that was not the agreement that you had?

(Testimony of Giulio Particelli.)

A. No, I don't remember if I have an agreement at all.

Q. I see. Now in connection with the work that you were doing for Tiara Products Company at the Lucca Winery after the sale, who handled all these business transactions for you?

A. My daughter.

Q. Your daughter? A. Yes.

Q. How did you get your money here of $1,243.26?

A. Mostly attorney settle it—send it down; I don't remember.

Q. You sent this to the attorney in Sacramento?

A. Ask my daughter. She is the one taking care of it.

Q. You are referring to Mr. Mull, are you?

A. Yes.

Q. Do you know who would have sent that to Mr. Mull? A. I don't know who sent it.

Q. Did Fred Foster send it?

A. I don't know.

Q. Who is Fred Foster, do you know?

A. He is a friend of my attorney from San Francisco.

Q. He is a friend of your attorney?

A. Yes.

Q. Now, is he an attorney? [58]

A. I think Fred Foster is an attorney. I know one Foster here in the City is an attorney; I don't know if he is the one.

Q. Now, who were you referring to when you

(Testimony of Giulio Particelli.)

were referring to your attorney?

A. No, not my attorney, a friend of my attorney, but no my attorney.

Q. Who was your attorney?

A. My attorney is Louie Lambert in Santa Rosa. He passed away in 1946.

Q. Yes. Did Mr. Foster have anything to do with this transaction of sale? A. Yes.

Q. What did he have to do with it?

A. I just—I want him to help me to do the thing all right.

Q. Did you go to him after you signed the agreement or before?

A. No, before. He come down Mr. George Oefinger's office together by me.

Q. And then after you talked to him, did he perform any services for you in connection with the closing of the deal? A. No.

Q. He didn't?

A. No, if I can help you, I will be glad; no for money because he is a very friendly to Mr. Hess, the lumber company. [59]

Q. What did you say about Henry Hess Lumber Company?

A. He told, if you need any advice for attorney or so, go down to my attorney, you don't have to pay one penny.

Q. And that is Fred Foster?

A. That is Mr. Hess lumber.

Q. Lambert? A. No. Hess lumber.

Q. But, Hess told you that, and they were re-

(Testimony of Giulio Particelli.)

ferring to Mr. Foster? A. Yes.

Q. So you went to Mr. Foster? A. Yes.

Q. Did he actually charge you for——

A. No.

Q. You never paid him anything for any services? A. No.

Q. Were any funds that were due you from Tiara Products Company paid to you through Mr. Foster? A. I don't remember.

Q. Don't remember that? A. No.

Q. Do you ever remember receiving a credit for $1,500 for your services to Tiara Products Company?

A. My daughter is taking care of all of books, I cannot remember, because all the mail come to him, and he makes all the [60] bills and expenses.

Q. Didn't your daughter ever report to you the financial condition of your business in connection with this transaction? A. Yes.

Q. She did? A. Yes, report to me.

Q. Do you remember then whether you received a credit of $1,500 for your services?

A. I don't remember at this time, now.

Q. Well, did you receive any credit for your services? A. Yes, they paid me some.

Q. But you don't know how much it was?

A. No.

Q. And you don't know now how you got it?

A. Well, I must have got it some way.

Q. How much wine went to Tiara Products Company as a result of this sale?

(Testimony of Giulio Particelli.)

A. How much?

Q. Yes. How much wine did—was involved in the sale to Tiara Products Company?

A. I can't tell you exactly. I have all the cooperage full.

Q. I will call your attention to the fact that the agreement calls for 275,000 gallons, you remember that, do you? [61] A. Yes.

Q. Did they receive 275,000 gallons?

A. I don't know because when I left the winery there was still some wine in the winery.

Q. Was there any modification of your agreement to ship them 275,000 gallons?

A. No, if I want to quit the next day.

Q. You what?

A. If I want to quit, we have between me and Mr. Dumbra, as soon as he be able to change the bond in his name and license in his name, I am going to work there for him, and she say 15 days, 15 days. We wrote a letter for Mr. Mull and so finally we get everything down to May 1st, and still have some wine in the winery.

Q. Yes. Now, this 15 days—15 day business that you were mentioning, that was an extension of time, was it, from time to time for the closing of this escrow agreement, is that your understanding of it?

A. Yes, because we closed the agreement before —I can't turn over the winery to Mr. Dumbra until I be able to get the license in his name.

Q. The license from the Alcohol Tax Unit, and State authorities, is that correct? A. Yes.

(Testimony of Giulio Particelli.)

Q. So, now then, referring back to December, 1943, I will [62] ask you again, was there any modification of your agreement to sell them 275,000 gallons of wine? A. Modification?

Q. I beg your pardon. Did you change that agreement to send them a lesser quantity?

A. No, I sold everything I have in the winery.

Q. Everything you had? A. Yes.

Q. Well, did you take any wine out of that winery?

A. Yes, because I reserved the right to take some wine, when I sold the winery and wine to Mr. Dumbra. I tell him I want to take some wine, before I ship and everything to you, or when I give you the key for my own use and I still have a few barrels.

Q. How much wine was that?

A. Around 1,000 gallons.

Q. 1,000 gallons, exactly. Now, there was an adjustment of the price there, wasn't there, then, for that 1,000 gallons?

A. Same price paid me.

Q. Same price paid you? A. Yes.

Q. And what was that?

A. Same, ceiling price.

Q. 28 cents? A. Yes. [63]

Mr. Marcussen: If your Honor please, I would like to offer as Respondent's Exhibit L a record to Tiara Products Company from A. M. Mull, Jr., dated May 4, 1944, and so that your Honor may follow the testimony and the record here, I call

(Testimony of Giulio Particelli.)

your Honor's attention that Mr. Mull states in part in that letter, "You will recall that 1,000 gallons were withdrawn by Mr. Particelli prior to the closing of the deal and that the whole deal amounted to 274,000 gallons, with an adjustment to be made by Particelli in connection with the 1,000 gallons," and I think Counsel will stipulate that this is signed by Mr. A. M. Mull, Jr., and it came from the files of the Tiara Products Company.

Mr. Brookes: So stipulated.

The Court: Admitted, as Respondent's Exhibit L.

(Whereupon the document marked Respondent's Exhibit L for identification was received.)

Mr. Marcussen: Then, as Respondent's exhibit next in order, that is M, a carbon copy of a letter from the files of Mr. Mull, from Mr. Mull to Mr. Victor Dumbra, care of Tiara Products Company, Inc., New York, New York, and call your Honor's attention to a statement contained on the reverse side of that letter. "Mr. Particelli withdrew for his own use 1,000 gallons of wine." The date of that letter, if I didn't give it, is December 23, 1943, and I offer that as Respondent's Exhibit M. [64]

The Court: Admitted.

(Whereupon the document marked Respondent's Exhibit M for identification was received.)

Q. (By Mr. Marcussen): Now, Mr. Particelli, I hand you Respondent's Exhibit N, for identification, which is a carbon copy of a letter from Mr.

(Testimony of Giulio Particelli.)

Mull to Tiara Products Company, and call your attention to paragraph two of that letter. Can you read it? A. I can't read English.

Q. You can't read English? Then I will read it to you.

"You will recall the understanding that Mr. Particelli was to receive the sum of $100 per week and on the basis of the agreement that he was there and the amount he demanded it would be 15 weeks, or $1500. On account of this $1500 you were given a $1,000 credit, and I sent Mr. Fred J. Foster check in the amount of $500 which closes this account out."

Now, having read that to you, I ask you whether that refreshes your recollection as to whether or not you received $100 a week for your services there. A. I forget how much it is.

Q. You forget, does that refresh your recollection at all?

A. I forget how much, he give me, I told him give me what you think is necessary.

Q. Does it refresh your recollection then that you [65] actually got $100 a week?

A. I think so.

Q. You think so? A. I don't remember.

Q. Now, then, I ask you also whether the reading of that paragraph from this letter refreshes your recollection as to the amount of the credit that you gave to Tiara Products Company for the 1,000 gallons of wine that you withdrew?

(Testimony of Giulio Particelli.)

A. I—they give it to me for the ceiling price like I sold to him.

Q. That is what you say you got? A. Yes.

Q. And do you think then, would you say that Mr. Mull was mistaken?

A. I don't know, maybe mistaken.

Q. That you got a dollar a gallon, or that rather Tiara Products Company got $1,000 credit?

A. I don't know, if it my mistake or Mr. Mull.

Q. But you say it's a mistake?

A. My mistake or Mr. Mull's.

Q. Yes.

Mr. Marcussen: I offer that in evidence as Respondent's Exhibit N, if your Honor please.

The Court: Admitted.

(Whereupon the document marked Respondent's Exhibit N for identification was received.) [66]

Q. (By Mr. Marcussen): If they offered you the $1,000 you took it didn't you, Mr. Particelli?

A. We got to see what for they offer me, I don't take it if I don't know why.

Q. If they offer the $1,000 you don't take it?

A. I don't take it.

Q. You wouldn't have taken it?

A. If I don't know what for they offer me.

Mr. Marcussen: If your Honor please, I would like to ask you whether this would be a good time to adjourn?

The Court: Well, we lose a little time. We

(Testimony of Giulio Particelli.)

usually go to 12:30 on these cases. Of course, if you can't proceed any further, we may have to adjourn.

Mr. Marcussen: I do want to check my files at the office for notes on the cross examination, and I apologize again, your Honor, for not having it with me.

The Court: We will adjourn until 2:00 o'clock.

Mr. Marcussen: Thank you, your Honor.

(Whereupon, at 12:00 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [67]

Afternoon Session—2:00 p.m.

The Court: Mr. Particelli, will you take the witness stand? You may proceed with your cross examination.

Mr. Marcussen: Your Honor, before we proceed, I wonder if we may have a call of the subpoenas that were issued to the Tiara Products Company and to Mr. Dumbra of the Tiara Products Company. I understand there is a representative here.

The Court: Do you want to put him on the witness stand?

Mr. Marcussen: I thought perhaps it might be well to do that first and get that cleared up if your Honor thinks that is all right.

The Court: Well, if you want to suspend your cross examination here.

(Testimony of Giulio Particelli.)

Mr. Marcussen: We might wait until we are finished with the cross examination.

The Court: All right.

Mr. Marcussen: If your Honor please, before proceeding with the cross examination, I would like to move for an exclusion of the Petitioner's daughter and son-in-law from the courtroom.

The Court: All right, you have heard a good part of it already. The privilege of remaining has been revoked as to the son-in-law and daughter of the Petitioner. Remain outside of the courtroom out of hearing of the testimony here and [68] respond when you are called.

Mr. Marcussen: Mr. Reporter, will you read back the last question and answer of the morning session?

(The last question and answer were read by the reporter.)

Q. (By Mr. Marcussen): Now, Mr. Particelli, I hand you Respondent's Exhibit O for identification, which consists of a file of net worth statements. A. What?

Q. A file of net worth statements. Do you know what a net worth statement is?

A. Net worth?

Q. Yes. A. You explain to me.

Q. Consisting of 12 pages, and I ask you to look at each one of these 12 pages.

A. I can't read no English.

Q. You can read your signature, can't you?

A. Yes.

(Testimony of Giulio Particelli.)

Q. I want to know if your signature appears at the foot of each one of these pages?

A. That's mine.

Q. And the bottom one? A. Yes. [69]

Q. The next one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. That one? A. Yes.

Q. Will you take a look at them, please, and tell me what they are?

A. I can't read English.

Q. You know what figures are, don't you?

A. I don't know what the figures mean. [70]

Q. What are those figures?

A. I can't read no English.

Q. I see. Well, did you file statements with the bank, telling the bank how much property you had, and how much money you owed? A. Yes.

Q. You did that?

A. Yes, Sebastopol Bank.

Q. And are these those statements, do you recognize these as the statements?

A. Recognize my signature there.

Q. How about these figures here? Can't you identify those as your statements?

(Testimony of Giulio Particelli.)

A. I don't make this here; I know I signed this.

Q. You just signed? A. Yes.

Q. What did you do, did you tell people what your property was and then——

A. No, told the bank.

Q. You went to the bank, did you?

A. For a loan of money.

Q. Yes.

A. I do business with him in the Sonoma Bank.

Q. And when you went to the bank to get loans of money—— A. Yes. [71]

Q. ——the bank asked you how much property did you have?

A. He know how much property I have.

Q. He would have to get that from you?

A. Yes.

Q. You knew how much you had when you went to the bank? A. Yes.

Q. You knew what you owned, what liabilities you had, what money you owed? A. Yes.

Q. And then you told him?

A. And also banker know.

Q. And do you recall that these statements were signed at the bank?

A. I signed the statements.

Q. Do you know whether they were signed at the bank when you had a discussion with the banker?

A. Most of them were signed by the banker.

Q. Wait a minute. What was your answer?

A. Most of them were signed in the bank.

(Testimony of Giulio Particelli.)

Q. Most of them were signed in the bank, but you say, "must have been signed?"

A. If the bank statement——

Q. Were they signed down there? A. Yes.

Q. When did you first crush grapes at your winery, Mr. [72] Particelli? A. What year?

Q. Yes, what year?

A. I started crushing grapes down to my ranch a little bit.

Q. You had a small crusher at your ranch?

A. Yes.

Q. Is that where your home is, at the ranch?

A. Yes.

Q. I think you testified something to the effect that you crushed about 15 to 18 tons?

A. Well, the first year, I crushed the ones I raised at the ranch. I don't think I bought nothing, I don't know.

Q. I see. When was the winery at Forestville which you sold to Tiara Products Company constructed, when did you finish it?

A. How big you mean the winery?

Q. No. When was it completed, when did you finish making it? A. 1943.

Q. 1943? A. Yes.

Q. When in 1943?

A. Well, before the crushing season.

The Court: That is not what you asked him. You want [73] to know when the winery was built?

Mr. Marcussen: Yes, he said before the crushing season.

(Testimony of Giulio Particelli.)

The Witness: The last building, 'cause I build it in three years.

Q. (By Mr. Marcussen): It took you three years to build it?

A. One year I built one section and next year other and in 1943 I built the fermenting room.

Q. The fermenting room? A. Yes.

Q. Now, was any part of that winery in operation then before 1943? A. Oh, yes.

Q. All right, then, how much—what part of it did you finish building in 1941?

A. The first concrete building.

Q. In 1941, a concrete building?

A. The cement block——

Q. Yes. A. Reinforced by steel.

Q. Now, was that the main building of the winery?

A. This is main building, the first building.

Q. Now, in 1941, then, you didn't operate—you couldn't operate it, could you? [74]

A. I crushing, I think, in '41.

Q. You did? A. Yes.

Q. Then you not only finished the main building, but you put in crushing machinery, is that it?

A. Yes. I don't know if it be finished time of crushing season; I forget if it finished, the main building.

Q. Did you crush any grapes at that winery in 1941? A. I forget, I can't tell.

Q. You don't know? A. No.

Q. Well, then, did you do anything else in that

(Testimony of Giulio Particelli.)

winery in 1941? A. I put up a tank.

Q. You what? A. Put up a tank.

Q. Oh, I am not talking about construction now. Well, I will finish with construction. In 1941, you testified, as I understand it, that you finished the building? A. Yes.

Q. That you put in this crushing machinery in there?

A. I don't know if I put it in in 1941, if I be through in 1941, I don't remember if I crushed there in 1941.

Q. You don't remember that?

A. I don't remember if I crushed here or in the one at [75] home, I don't remember.

Q. You put in the crushing machinery, began to put in the crushing machinery in 1941?

A. Yes, the first year I build.

Q. Yes, the first year. When did your building operations begin in 1941, what month?

A. I can't tell.

Q. You don't know whether it was the winter, summer, spring or fall, is that right?

A. I forget what month, I no remember.

Q. Would you know what season of the year?

A. You mean when I started building?

Q. Yes.

A. First I have—I have to fill up the ground first because it's too soft down there, and I think I started building in the summertime some time.

Q. You think in the summertime?

A. In the wintertime impossible because there

(Testimony of Giulio Particelli.)

is water down there, I bought this land.

Q. This land that you are talking about, is that the fill-in land that you are talking about?

A. Yes.

Q. You had to fill in?

A. Fill in by rock.

Q. With rock? [76] A. Yes.

Q. And your best estimate is then that it started in the summer of 1941?

A. I think it was started around the springtime or summertime, I forget.

Q. Springtime. All right. And you built the main building, and you put a roof on it, I take it?

A. Yes.

Q. And in the year 1941 you started, at least, putting in the crushing machinery, is that right?

A. I don't want to say sure, I don't know if I crush there in 1941 or if I crush in ranch.

Q. I see. Entirely apart from where you crushed at the plant——

A. I don't know if I crushed there.

Q. In 1941, tell me, did you install the crushing machinery in 1941?

A. Maybe I install the crushing machinery, I don't know if I crushed there?

Q. Well, the answer is that you don't know. Then, entirely apart from that, what other installations—machinery, tanks and such did you put into that building in 1941, if any?

A. I just put in tank.

Q. What kind of a tank?

(Testimony of Giulio Particelli.)

A. A redwood tank. [77]

Q. One redwood tank?

A. I don't know how many I put in, I put in little by little.

Q. I see. Little by little. How long did it take you to put in the redwood tank?

A. I can't buy no redwood tank, nobody selling redwood tanks, the Government taken over all redwood tanks. I bought pretty near all secondhand tanks.

Q. And were all of your tanks constructed out of old, secondhand materials, then?

A. Secondhand tanks.

Q. You just moved in the old, secondhand tank?

A. You tore them down and put them up again, you can't move all the tank.

Q. What is the storage capacity of the tanks?

A. 3,000 gallons, one is 5,000, one is 12,000.

Q. Can you tell the Judge how high that is?

A. Building?

Q. No, the tank.

A. About 10 feet, 12 feet, 8 feet.

Q. And how much in diameter?

A. It depended on how many thousands, it goes by how many thousands.

Q. What was the largest tank you had?

A. It's a 19,000 gallons. [78]

Q. 19,000?

A. 19,000 and a few hundred, I forget the exact gallons.

Q. And how many tanks in total did you have?

(Testimony of Giulio Particelli.)

A. I can't tell you because I have a lot of small tanks.

Q. Well, you mean to tell me you don't have any idea how many tanks you had at the winery which you operated?

A. I can't tell how many tanks I have, because I have a 100,000, some 700 gallons, some is 500 gallons, up to 19,000.

Q. Do you recall whether you did any crushing in the winery in 1942?

A. I can't tell, I forget, I don't know, I don't want to say for sure.

Q. Is there anybody in your family that knows?

A. You can ask my daughter.

Q. Do you know whether she knows?

A. She knows just as much as I know, because she keep the books, she the one that makes the form, selling all the tubes.

The Court: What year did you commence crushing grapes?

The Witness: What year I started crushing grapes?

The Court: Yes.

The Witness: I think in 1935.

The Court: Approximately '35. What year did you start crushing grapes in your winery?

The Witness: I have a winery down there in my home, a little small one. [79]

The Court: All right.

Q. (By Mr. Marcussen): I think you testified that you had a little winery at your ranch, is that

(Testimony of Giulio Particelli.)

what you mean? A. Yes.

Q. And that is the winery you referred to when you told the Judge you started crushing in 1935?

A. Yes, I think 1935—1936, I started—have a bond permit by the Government to crush.

Q. Yes, right around that time. By the way, how large was that winery?

A. I have a fermenter room in the yard, and I keep all the wine below my house, and the capacity all together, a small tank, I think about 32, 33,000 gallons.

Q. That was your complete storage capacity.

A. In my ranch.

Q. And it was under your house?

A. Under my house.

Q. Where was the crusher?

A. It's down in the yard, I built a little shack, simple, and I fermented down there; oh, about 50 feet away or 60 feet from the house, and I—when I make the wine, I pump it to below my house by pump, the little pump which used air forced power.

Q. And you say you think your total storage capacity of [80] that winery was about 30,000 gallons? A. A little over, 32, 33,000.

Q. Did you crush in that winery every year that you had it, beginning with 1935 or '36?

A. When I started crushing, crushed a little bit every year.

Q. Right up to 1943? A. 1943.

Q. And did you do it in 1944 too? A. No.

Q. You still had it?

(Testimony of Giulio Particelli.)

A. I sold the grapes.

Q. You sold your grapes in 1944?

A. Yes.

Q. But you still had the winery in 1944?

A. I had nothing in my ranch no more, because I move everything to Forestville; when I build the new one in Forestville, I move everything from my ranch down to the new one.

Q. When you constructed the winery which you sold to Tiara Products Company, did you dismantle your winery on the ranch and move the equipment to that winery?

A. There is a long time before I moved.

Q. Didn't you testify this morning that you sold this ranch a year and a half after you sold the winery to Tiara? A. Yes. [81]

Q. And on that ranch was this small winery that we are talking about?

A. It was no operatable.

Q. It was there? Just answer my questions, Mr. Particelli, and I think we will get this clear.

Mr. Brookes: May I object; I don't think that this witness should be harangued or abused, and he will be confused by the fact that he has already given Mr. Marcussen a completely direct answer to the question and he will think Mr. Marcussen is asking him another question because he will not assume that Mr. Marcussen has not understood the answer.

Mr. Marcussen: May I ask what your understanding of his answer to be?

(Testimony of Giulio Particelli.)

Mr. Brookes: He told you some time ago, a few questions ago, when he built the winery at Forestville he moved the winery equipment that was in the basement of his house down to the Forestville winery.

Mr. Marcussen: By Forestville winery, do you refer to the winery that is the subject of this litigation, the sale to Tiara?

Mr. Brookes: Perhaps if you ask the witness that, you would find so did he.

Mr. Marcussen: I will have to start over, then; I don't mean to harangue the witness. I don't understand his language very well and perhaps he doesn't understand me. [82]

Q. (By Mr. Marcussen): Now, if you don't understand any of my questions, Mr. Particelli, will you say so, so that I may repeat it? A. I try.

Q. You try to do that?

A. I ask you a couple of times if I don't understand.

Q. We will all want you to do that, if you please. Now, referring to the small winery that you had on your ranch where you lived, in which you started crushing grapes at around 1936 or 1935, did you move that winery equipment into the winery at Forestville which you sold to Tiara? A. Yes, sir.

Q. You did? A. Yes.

Q. Do you remember when you moved it?

A. No, I don't remember.

Q. But it was before the sale, wasn't it?

A. Oh, yes, couple of years before.

(Testimony of Giulio Particelli.)

Q. Yes. Now, when did you first start crushing in the Tiara Winery?

A. You ask me before, I say 1941, and I forget, I don't know if I crush there in 1941 or if I started in 1942.

Q. But you are sure that at least you were crushing in '42, is that correct?

A. In 1942, yes. [83]

Q. Now, how much did you crush there in '42?

A. I can't tell, my daughter keep the books.

Q. Do you know whether your daughter knows?

A. Well, you can ask her, she keeps the books.

Q. Haven't you talked that over with her before you came up here in this trial?

A. Me and the daughter, we don't talk for four years, after I divorce her mother, and the first time we meet here this morning in the court and outside.

Q. Did you have any conference with her in your counsel's office?

A. Just yesterday, we meet, my attorney, me and the daughter.

Q. Then it wasn't true that you met her for the first time in the courtroom? A. What?

Q. The statement was there——

A. We never talked together.

Q. You didn't talk to her in Mr. Brookes' office, is that what you meant to say?

A. He asked some questions to me and asked some questions to my daughter; I don't talk to her.

Q. You didn't ask your daughter to come and

(Testimony of Giulio Particelli.)

testify on your behalf in this case?

A. No, I never asked, she is interested just as much as [84] me is because she is interested in one-half of the property.

Q. Is she the beneficiary of your former wife's will? A. Yes, I think so.

Q. Do you have any idea at all how many grapes you bought in 1942? A. No.

Q. Do you say to the Court that you can't remember whether you bought 100 tons or a thousand tons?

A. I can't tell how many tons I crushing.

Q. How long would it take you to crush 100 tons of grapes?

A. Oh, depend on what kind of machinery you have.

Q. Well, your machinery?

A. My machinery takes about 4, 5 days.

Q. 4 or 5 days; how many days did you crush?

A. Oh, we don't crush steady.

Q. I don't say that, I realize that, but how many days in the 1942 crushing season did you crush about?

A. I don't know, the sun is coming one time, we crush; maybe the whole day it don't come any more. I don't keep the books; my daughter keep the books how much we crush.

The Court: Who did the crushing?

The Witness: I did the crushing.

The Court: You know about how often you crushed, don't you? [85]

(Testimony of Giulio Particelli.)

The Witness: Like I say, sometimes a couple of hours in the—sometimes the four, five trucks come the one time.

The Court: Who bought the grapes?

The Witness: I did.

The Court: Can't you remember about what quantity of grapes you bought?

The Witness: I can't tell exactly how many ton.

The Court: We are not asking exactly, but just give your best estimate of it. Did you buy great quantities or small quantities?

The Witness: I think we make over 100,000 gallon of wine, I don't know how much wine we make in 1942.

Q. (By Mr. Marcussen): But you think it's over 100,000 gallons?

A. I think so, I don't want to be sure, but I think so.

Q. Now, Mr. Particelli, I want to make it clear that when I ask these questions, I don't—I want the substantial truth, I am just asking you generally how much. You see, when I ask you a question—you said a minute ago when I asked you, you didn't know whether you had crushed a hundred tons of grapes or a thousand, and now you say that your best estimate is that you crushed, you got 100,000 gallons, isn't that right?

A. You no ask me how many gallons of wine I make, you [86] asked how many ton I crushed.

Q. Yes, do you know how many gallons of wine on the average you get out of a ton of grapes?

(Testimony of Giulio Particelli.)

A. 150, 155.

Q. Now, that 100,000 tons, more or less, you can't be any more specific about that than that, is that correct? A. No.

Q. I beg your pardon, 100,000 gallons; Counsel corrects me. Now, when did you sell that?

A. I sold little by little.

Q. Beginning when?

A. Well, beginning couple of months after we make, you know. We can't sell the bottles like I said before. We have to sell from bulk, in barrels, because we have no machinery to finish, and I sold for cheaper wine.

Q. Did you move any tanks into that winery in 1943? A. If I move any tanks?

Q. Yes.

A. I bought some more tanks in 1943, yes.

Q. About how many, and how many gallons of storage capacity?

A. I think I put up about 150,000 gallons in 1943. The exact amount of the gallons I don't know.

Q. Then when did you—I think you testified that you carried over from the 1942 season? [87]

A. A little bit.

Q. A little bit. What do you estimate as a little bit?

A. Well, I don't know if it would be around 15 or 20,000 gallons, I forget how many thousand gallons.

Q. Would it be 30,000 gallons?

A. I don't know.

(Testimony of Giulio Particelli.)

Q. Approximately?

A. I don't know because I don't keep the books, my daughter keeping the books, you see.

Q. Your daughter knows about that?

A. Must know, she keep the books.

Mr. Marcussen: If your Honor please, I have just spoken with Counsel about a stipulation which we would like to make at this time, or rather I would like to make. I would like to ask Counsel to stipulate that in a sworn protest, submitted by this taxpayer and signed by him, and verified by him, there appears the following statement, "During the fall of 1943, the taxpayer produced 244,532 gallons of raw wine, all of which was sold under the contract of sale entered into on December 6, 1943. The balance of the 275,000 gallons sold, namely, 30,468 gallons was old wine produced in 1942 and prior years."

Do you so stipulate Counsel?

Mr. Brookes: I stipulate that that sentence is here in the protest and that the protest was signed by Mr. Particelli.

Mr. Marcussen: And verified? [88]

Mr. Brookes: And verified by him.

Q. (By Mr. Marcussen): Did you carry over any wine from the 1941 crush, if any, to 1942?

A. I don't know, I don't remember.

Q. I think you testified a minute ago you don't remember when you started crushing in the winery in '41? A. No.

Q. I will ask you whether you carried over—

(Testimony of Giulio Particelli.)

I will ask you whether or not in 1941 you did any crushing at the small winery at the ranch?

A. I do, if I don't do in Forestville, the new wine, I crush at the old winery, but I can't tell exactly if I crush there or in Forestville because I don't remember.

Q. Did you carry over any of the wine that you may have crushed in the small winery in 1941?

A. I don't think so, just a little wine.

Q. You think you sold that all off?

A. I think so, I don't want to be sure, just a little bit left.

Q. Now, did you crush in your small winery in 1942? A. No.

Q. You did not crush in that winery?

A. No, no the small one, no.

Q. In '42. Now, referring to the wine that you crushed [89] in the big winery, that is the one you sold to Tiara, you state that you began selling that a few months after that was crushed, is that correct?

A. No, in '43, I never sold one gallon for the 1943 wine until I sold to Tiara.

Q. Now, I am talking about the 1942 crush.

A. The 1942 crush, two or three months after we started selling a few.

Q. You started selling a few gallons?

A. Yes.

Q. And when was your last sale, do you recall?

A. No.

(Testimony of Giulio Particelli.)

Q. Over a period of how many months did you sell that?

A. We sell a little every week.

Q. 70,000 gallons?

A. We sell a little bit every week.

Q. Every week? A. Every week.

Q. And did those sales continue right up until you began crushing in 1943? A. Yes.

Q. And how did you sell it, did you sell it in bulk?

A. I do sell, I think, few thousand gallons in bulk in the east.

Q. And you shipped that by tank car, did you?

A. Tank car.

Q. Do you recall the size of those tank cars?

A. Well, tank car is 6,000 up to 8,000.

Q. Yes. Can you estimate approximately when you sold those tank cars in the east?

A. I forget what month.

Q. What season of the year in 1943?

A. Oh, I can't tell, in the wintertime or springtime, or summertime, I can't tell; I don't remember.

Q. Now, the wine that you would ship in tank cars, that would be finished wine, would it?

A. No.

Q. You did not finish any wine?

A. I just rack it a couple of times and filter a couple of times but no put in bottle, I ain't got no —I don't have any machine.

Q. I am not talking about bottling in gallons,

(Testimony of Giulio Particelli.)

I am talking about tank car shipments to the east in 1943, prior to the 1943 crush.

A. I just filter the wine and rack.

Q. It was racked, you say?

A. And filtered.

Q. How many times was it racked?

A. Two, three times.

Q. That is part of the finishing process, isn't it?

A. You have got to do something else if you want to finish.

Q. But that is how you start finishing the wine, is to rack it, isn't that correct?

A. You don't call it finish.

Q. Not completely finished, but that is part of the finishing process, is it not?

A. Start the rack is what you call part of the finish.

Q. Now, whom did you sell that wine to in the east? A. I think I sold to Sun Set.

Q. You mean the sun that shines in the sky?

A. My daughter can tell you exactly what company and what state and what town, I forget, I think Ohio, Sun Set Wine.

The Court: Sunset Winery, Toledo, Ohio?

The Witness: I think so; I don't want to be sure.

Q. (By Mr. Marcussen): What did you sell that wine for?

A. I forget how much I sold it.

Q. Several tank cars, and you forget the price, in 1943? A. I forget how much I sold it.

(Testimony of Giulio Particelli.)

Q. Do you have any idea at all what you sold that wine for?

A. No, I don't know if I sold 35 or 40 cents, or 28 cents.

The Court: He wants to know what price you got. [92]

The Witness: Yes, I know, I forget.

Q. (By Mr. Marcussen): You don't know whether it was 25 or 38? A. No.

Q. Now, I think you testified that you had a little bottling plant and that was at your small winery, was it?

A. No, not there, far away from the winery, down in Forestville.

Q. Down at Forestville?

A. About 300 feet away from the winery.

Q. Away from which winery, the big one or small one? A. The big one.

Q. Was it near the small one?

A. The small one is down at the winery in the ranch about a mile and a half away.

Q. I see. Was the bottling plant part of your strore facilities there? A. Yes.

Q. At the store? A. Yes.

Q. Now, you testified this morning, Mr. Particelli, to wine that you purchased, as I recall, from Italian Swiss Colony, from Petri, from Geyserville Growers, and I think you testified that wine was all purchased for bottling purposes, is that correct?

A. Yes.

Q. Do you have a tax paid room at the big

(Testimony of Giulio Particelli.)

winery which was sold to Tiara? A. No.

Q. Where were the deliveries of this wine that you purchased made? A. Down at the store.

Q. At the store? A. Yes.

Q. And that was all tax paid wine when you received it, wasn't it?

A. In the store, also I bought and sell wine in bulk.

Q. You bottled some wine in bond?

A. I bottled some wine for Italian Swiss Colony in bond, and they go down and put it in storage.

Q. About how much did you——

A. ——I don't know how many.

Q. Well, now, approximately.

A. Well, I can't tell, because I no bought it all at one time.

Q. Was it a hundred gallons?

A. Oh, more.

Q. Was it a thousand?

A. I think more than a thousand because when we buy this bond—— [94]

Q. Was it a hundred thousand?

A. No, no.

Q. Was it fifty thousand?

A. I can't tell you exactly, I know more than one thousand because if it be just one thousand it don't pay to have all this trouble to buy in the bond.

Q. Was the bottling plant under bond?

A. Bottling plant what?

Q. Was your bottling plant, this little installation near the—at the store—was that under bond?

(Testimony of Giulio Particelli.)

A. I have license, yes.

Q. You have a what?

A. We have a bottling license.

Q. Bottling license? A. Yes.

Q. But was it under bond?

A. No, because everything tax paid there.

Q. Everything tax paid?

A. Everything we keep there is tax paid.

Q. And the bottling that you did on account of other people, that was tax paid wine, is that correct?

A. Wine comes down to the bottling place is all tax paid.

Q. Did Petri and Italian Swiss Colony and Geyserville and the people that you bottled for, did they just pay you for the bottling, is that correct? [95]

A. No, I bottled myself.

Q. You bought it yourself?

A. I buy the wine.

The Court: You said you bottled some for other people, as I understood?

The Witness: The—below my label, below my name.

Q. (By Mr. Marcussen): Now, the question I was just about to ask you; what did you mean, Mr. Particelli, when you said that you bottled wine for other people, that is for Italian Swiss Colony and Petri?

A. Italian Swiss Colony, if you want to sell our wine, you buy wine for the company, and we also furnish the label, name Italian Swiss Colony, bot-

(Testimony of Giulio Particelli.)

tled by Lucca Winery, Forestville.

Q. And when that wine was all bottled by you, did you own it?

A. Yes, because I buy in 50 gallon barrel and 25 gallon barrel.

Q. And then you owned the wine? A. Yes.

Q. You didn't ship it back to the Italian Swiss Colony? A. No.

Q. Did you buy bottled wine from Italian Swiss Colony? A. Yes.

Q. Were their labels already on it? [96]

A. Yes, Tipo Chianti, Burgundy.

Mr. Marcussen: Now, if Your Honor please, I have in the courtroom Mr. Cerruti, who is an Internal Revenue Agent of Italian extraction, and he informed me that he is familiar with the language that Mr. Particelli would have spoken in Italy, or the Italian language. I wonder if we could ask Mr. Particelli to say something in Italian and if I may ask Mr. Cerruti if he understands him, and then possibly, if Counsel is agreeable and Your Honor is agreeable, have Mr. Cerruti sit over here and listen and possibly give me the answer, subject to any inquiry that Counsel would want to make from time to time?

Mr. Brookes: I can't stipulate to that because Mr. Cerruti has been identified as an Internal Revenue Agent; he is not a disinterested party, and I don't speak Italian nor do I understand it. I will make this suggestion, Mr. Particelli's daughter has told me that they spoke Italian in the household

(Testimony of Giulio Particelli.)

when she was brought up there, and she speaks Italian and understands it, and I—I mean Mrs. Guerrazzi, I mean Mr. Particelli's daughter. She undoubtedly understands her father's language better than, or certainly as well as, this gentleman. If they cross-check each other, I will have no objection to it.

Mr. Marcussen: If Your Honor please, I want to state that Mr. Cerruti has had nothing to do with the preparation of this case. I think it could be said safely that he is not an [97] interested party in any way. He will not be called as a witness. Mrs. Guerrazzi will be called as a witness in this matter and I noted this morning, if Your Honor please, the reason I made the request that she be excluded from the courtroom was that in answer to almost all of the questions that were put, Mr. Particelli would look to his daughter before making an answer, and I felt under the circumstances I would have to make a request to have her excluded from the courtroom, and I merely make this suggestion if it will speed up the proceedings and assist Your Honor.

The Court: If he is not willing to have a government official to act as an interpreter, I think I wouldn't feel like forcing him to do it.

Mr. Marcussen: Very well. May I ask whether Mr. Cerruti may not be seated near the reporter and near the witness chair, and may I ask to consult Mr. Cerruti?

The Court: You will not ask the questions in Italian?

(Testimony of Giulio Particelli.)

Mr. Marcussen: No, but he would understand Mr. Particelli's English. I realize that Mr. Particelli is making every effort.

The Court: Why not sit there?

Mr. Marcussen: Can you hear just as well here?

Mr. Reporter, will you read the last question and answer? [98]

(The last question and answer were read by the reporter.)

The Court: Tipo Chianti?

Mr. Brookes: He said Tipo Chianti.

Mr. Marcussen: I suppose I am a Californian by now and I, therefore, must apologize.

Mr. Brookes: You are not a native?

Mr. Marcussen: I am not a native.

Q. (By Mr. Marcussen): Did you testify this morning that you purchased some wine for blending purposes? A. Blending?

Q. Yes.

A. I never sell wine for blending.

Q. Well, I asked you if you ever bought any for blending.

A. Oh, yes, yes, I bought some for blending.

Q. About how much in 1942 and '43?

A. I don't know how much. We bought.

Q. Did you buy any in 1942?

A. Yes, I bought some.

Q. For blending? A. Yes.

Q. Did you have enough tanks in your winery at that time? A. Oh, yes.

Q. What would you estimate was the extent of

(Testimony of Giulio Particelli.)

your purchases for blending in 1942? [99]

A. Well, they give you better test than my wine, put some finish wine inside.

Q. I didn't ask you the reason for that, I asked you how much wine did you buy on the outside for blending purposes in 1942?

A. I can't tell how much I bought.

Q. Do you have any idea at all?

A. I forget, it's a long time ago, seven years ago.

Q. By September, 1942, how much storage capacity did you have in your main winery, and by the main winery, when I say that, I mean your large winery that you sold to Tiara. Now, by September, 1942, what would you estimate was the storage capacity of your tanks there?

A. Pretty close to 200,000.

Q. 200,000?

A. Pretty close there, I don't know exactly, I can't tell exactly.

Q. But I think you only crushed about 100,000 in grapes in 1942?

A. I don't want to say, I don't want to insist how much I crushed——

Q. At the end of 1942, were your tanks full?

A. Oh, no, I have a lot empty.

Q. About how many, what estimate, the best you can, you don't have any recollection? [100]

A. No, I don't remember. I can't say, one or two thousand gallons, three thousand gallons.

Q. You don't know whether you had in Decem-

(Testimony of Giulio Particelli.)

ber of 1942, you can't tell the Court whether your tanks were 50 per cent used or filled up with wine, or, rather, 50 per cent of your tanks by capacity were filled up with wine, or 70 per cent, or 60 per cent or——

A. I think around 50 per cent would be filled up. I don't want to say for sure how many thousands.

Q. Well, your best estimate. About 50 per cent?

A. Maybe 50 per cent would be full, I don't know.

Q. Now, do you know what your purchases, total purchases, of bottled wine were in 1943?

A. How much you mean paid for?

Q. No, what is the total amount that you purchased in 1943, approximately, from Italian Swiss Colony? A. No, I can't tell.

Q. Remember you said you bought some with the label on it?

A. I can't tell how much it was we bought.

Q. Was it a small quantity?

A. We bought a lot of wine from Italian Swiss Colony, we more than anybody else.

Q. In 1943? A. In 1943, and 1942. [101]

Q. Both in bulk——

A. ——and in case.

Q. ——and in case? A. Yes.

Q. Was most of it in case?

A. No, most of it in bulk.

Q. Mostly in bulk?

A. Yes, and I think I bought some in bond.

(Testimony of Giulio Particelli.)

Q. If it was in bulk, it would all have to be in bond, wouldn't it?

A. I think so; bought some in bond besides in bulk, you know when you buy in bond you don't need to pay tax. You pay the tax when we sold, and instead of bringing it down in the bottling plant, I put it down in my tank in the winery, and when I go there, to the bottling plant, also we got to put a stamp on the bottle.

Q. And I think you testified that you never bottled anything of your own product?

A. I said in 5 gallon demijohn and 10 gallons and barrels and 25 gallons.

Q. I am talking about bottling. You don't call that bottling, do you? A. No.

Q. Now, this store that you operated, you said, I think, that the bottling plant was right there at the store? [102] A. Yes.

Q. And that was in Forestville?

A. In Forestville.

Q. And your sales there were in retail, were they?

A. In the same building by the bottling place, we had a little room separate there, what we call a retail store.

Q. Yes, and did you make any wholesale sales?

A. No, no.

Q. All retail?

A. In the store there, in the little store, it was all retail. Gallons, bottles.

Q. You didn't have the fortifying room at the

(Testimony of Giulio Particelli.)

main plant, did you? A. No.

Q. Referring to the wine that you sold in 1943, your own wine that you made, I think you testified that you sold it a few thousand gallons a month and that continued more or less throughout the year until the 1943 crushing began? A. Yes.

Q. And in how large a quantity would you sell that wine, I think you testified that some of it went out in tank cars? A. Yes.

Q. About how many tank cars did you ship?

A. I forget how many tank cars. We sold just one time this tank car. I forget how many tanks. Only time we sold it [103] in tank cars.

The Court: You just sold to one particular winery in tanks?

The Witness: Yes.

The Court: That was the Toledo, Ohio company?

The Witness: The Sunset Wine, that is the only time I sold in bulk.

Q. (By Mr. Marcussen): Was that Toledo, Ohio, did you say?

A. It's at a name, my daughter know the town, it's Ohio, I think.

Q. Was it one of the big cities, do you know?

A. No, it's called Sunset Winery.

Mr. Marcussen: If Your Honor please, Counsel and I have had a further discussion about the possibility of using Mr. Cerruti to assist. We don't know much Italian language and I don't know that the reporter understands, and I am certainly quite concerned as to whether the reporter is getting this

(Testimony of Giulio Particelli.)

as it goes in. Mr. Brookes tells me that he would be quite willing to have Mr. Cerruti sit up there, and if we could both get up there, if Mr. Cerruti would make a statement in English as to what the answer was, we could go in and begin that way subject to, that is, agreement of both Mr. Brookes and myself as to what it was.

Mr. Brookes: I have no objection to that. My [104] objection before was that I did not wish to be bound by the translation of anyone who is in the position, I insist, of being not a disinterested person, and there is no personal reflection on Mr. Cerruti intended, but he is an Internal Revenue Agent. But, if he asks the witness questions in English, paraphrasing what Mr. Marcussen has asked—by now I have learned to understand Mr. Particelli very well, and I can feel protected then. The question will be asked in English and the answer in English, if it will help, if it will expedite matters.

The Court: Well, then, is that just—you want him sworn as an interpreter?

Mr. Marcussen: I didn't have that in mind unless the counsel would like to have him. We might swear him, yes, I would be very happy to have him sworn.

Mr. Brookes: If the Court is at liberty to admit Cerruti as co-counsel for the purpose of this case, that would perhaps suffice. Then he could ask the question that Mr. Marcussen wanted him to ask, and he could ask it in English and it would appear as asked by him in the record.

Mr. Marcussen: No, I don't think you are clear.

(Testimony of Giulio Particelli.)

I am not concerned with whether the witness—I am concerned whether the witness understands my questions; for the most part I think he does, and I think if he get his answers, we [105] will be able to ascertain whether he understands my question or not. The thing that I have in mind that is of paramount importance is whether or not the reporter is getting a correct statement of Mr. Particelli's testimony. Now, the last answer, I certainly didn't. Now the reporter is going to repeat the last question, Mr. Particelli, and then I would like to have you give your answer, and then I will ask Mr. Cerruti to state in English—I beg your pardon, it's no reflection, I realize you are talking English too, but to repeat in English what you said, and then I want to ask you whether he repeated it correctly.

(The last question and answer were read by the reporter.)

The Witness: Yes.

Mr. Marcussen: We will proceed, then.

Q. (By Mr. Marcussen): Do you think you might have shipped 10 tank cars?

A. No, no 10 cars, I don't think so.

Q. Would it be close to 5, do you think, according to your best recollection?

A. Well, I forget how many thousand car—gallons I sold for this Sunset Winery. If it be 50,000 gallons sold, I know I sold only one time.

Q. Only at one time?

A. Only one time, to this particular winery.

Q. Do you know whether that was sold prior to

(Testimony of Giulio Particelli.)

June of [106] 1943, or prior to July of 1943?

A. I can't tell the month. I know I sold in tank cars and I think I sold around 50 60,000 gallons. I don't want to be sure, because I can't say what month.

Q. But it's approximately 50 or 60,000 gallons?

A. Maybe more, I don't know.

Q. It may be more, you say?

A. It may be more or less. It's the only time I sold.

Q. You don't think it would be any less, do you?

A. I don't think so.

Q. Now, what was the price at which that was sold? A. That I forget.

Q. Now, when you went to the bank from time to time, to tell them about what property you had, did you tell them as accurately as possible?

A. Well, I tell them the property, where it is located. They know all my property.

Q. Well, what about wine, if you had wine on hand, you would tell them how much you valued the wine, is that correct?

A. I can't tell them the value because the wine is up and down. I tell them how many gallons I have in hand.

Q. Did you tell the bank what you expected to sell your wine for from time to time?

A. I can't——

Q. Pardon? [107]

A. I can't tell how much I sell it, we don't know

(Testimony of Giulio Particelli.)

the price how much it going to be, to go up or to go down.

Q. If you sold some wine to the Sunset Company in Ohio, in 1943, in tank cars, you would tell them, I suppose, what price you sold it at, wouldn't you?

A. Well, the money is coming to the bank there.

Q. The money would come right into the bank, would it? A. Yes.

Q. You sold it on a bill of lading, did you?

A. Yes.

Q. Is that it? A. Yes.

Q. And did you get a draft on the bank of the purchaser?

A. I think so. You ask my daughter, I think so.

Q. You know what a draft is, don't you, a bank draft? A. I think so.

Q. You know what that is?

A. Well, payable to the bank.

Q. Did you—when you shipped some wine, you sent it with a bill of lading, and did you put a draft with the bill of lading and have the purchaser accept the draft?

A. No, think they are going to send the money after.

Q. What do you mean?

A. After they receive the wine, I don't know. I think the contracts—the way they work. [108]

Q. But before they get the wine, they have to sign the draft, is that correct?

A. I think so. I don't know, I no much in business to ship wine. My daughter——

(Testimony of Giulio Particelli.)

Q. But picture the situation now, Mr. Particelli. You are selling them some 50 or 60,000 gallons of wine. You just never shipped out wine?

A. I know to ship one tank at a time.

Q. But you didn't ship it out without protecting yourself on the price, did you? A. No.

Q. In other words, you had the purchaser either pay for it, or accept a draft, didn't you, to give you a promise to pay for it?

A. Promise to pay each carload we sell.

Q. As they get it, is that correct?

A. Yes, and they paid for it.

Q. And then the papers were sent to your bank, were they? A. I think so.

Q. And then when would you get the money?

A. I think right away.

Q. Right away? A. I think so.

Q. And then when you sold this lot of wine in tank cars, if you had sold any of that, would you tell the bank about it? [109]

A. I put all the money there, we receive is go to the bank.

Q. And if there was some that you hadn't received, you told the bank what price you were getting for it and how much it was worth?

A. I don't know if I told them the price. I deposited all the money I collected.

Q. Well, you didn't get it. You said a moment ago that money came to the bank? A. Yes.

Q. For your account, isn't that correct?

A. Yes, some come for myself directly.

(Testimony of Giulio Particelli.)

Q. Some come directly?

A. Directly, I think so.

Q. Was that a requirement of the bank that you had some of it come right from the bank to pay off loans?

A. I have a loan at the bank, and I was supposed to pay so much a gallon, each gallon of wine I sold I would—was supposed to pay so much a gallon to the bank.

Q. And now, with respect to the wine that you still had in storage at the winery, when you made out the statements to the bank, didn't you ever tell them what the wine was worth?

A. The bank never asked me how much wine was worth.

Q. Did they know?

A. I don't know if the bank—never asked me nothing. [110] They go by the marketing price.

Mr. Marcussen: If Your Honor please, at this time I would like to ask permission of the Court to, on behalf of both myself and Mr. Brookes, to withdraw exhibits that are submitted in evidence, after the conclusion of this case for the purpose of substituting photostatic copies or for the purpose of making copies, and return the ones that were submitted, as we have been unable to get all of this copy work done before this trial. I shall be glad to stipulate with Counsel if that permission is granted, I will withdraw any of the exhibits submitted on behalf of Respondent at his request so that he may have a copy, and I think Counsel will stipulate with

(Testimony of Giulio Particelli.)

me that he will withdraw any of his so that I may have a copy so that we may not be required to ask permission from time to time with the possibility that we might skip one. I wonder if we couldn't have that understanding?

The Court: Does that cover the exhibits in the stipulation also?

Mr. Brookes: Those are in sufficient number already.

The Court: You may have that permission as to all exhibits offered in evidence by either the Respondent or the Petitioner.

Mr. Marcussen: Thank you, Your Honor.

The Court: We will take a recess.

(Whereupon a recess was taken.) [111]

Mr. Marcussen: Mr. Reporter, will you read the last question and answer, please.

(Last question and answer were read by the reporter.)

Q. (By Mr. Marcussen): I want to repeat my question. Did you ever tell the bank what your wine was worth that you had on hand at the time that you made the statements to the bank?

A. I don't remember I tell any price to the wine.

Q. You don't remember?

A. No, I don't make any statement as to how much the wine was worth.

Mr. Brookes: Your Honor, may I request that the reporter be instructed to read the question

(Testimony of Giulio Particelli.)

and the answer to Mr. Marcussen, Mr. Marcussen's first question and the answer that he understood that the witness gave?

The Court: You mean the one just before the last one?

Mr. Brookes: Yes.

(The question and answer referred to were read by the reporter.)

Mr. Brookes: Your Honor, I am satisfied that the reporter correctly got the answer.

Mr. Marcussen: If Your Honor please, I offer in evidence Respondent's Exhibit P for identification, which I ask Counsel to stipulate is a typewritten copy of a net worth [112] statement filed by the Petitioner with the Bank of Sonoma County, I believe it is, is that correct?

Mr. Brookes: Yes, that is correct.

Mr. Marcussen: On July 7, 1943, and I ask Counsel to stipulate that that statement is a true copy of a similar statement appearing in Respondent's Exhibit O for identification, which are the originals bearing the signature of Mr. Particelli.

Mr. Brookes: I stipulate to that as a true copy of the original appearing in file identified as Exhibit O.

The Court: It is a photostatic copy?

Mr. Marcussen: Yes, it's a photostatic copy of another typewritten copy, not of the original.

The Court: I see.

Mr. Marcussen: It's a conformed typewritten copy, and I call Your Honor's attention to the fact

(Testimony of Giulio Particelli.)

that listed among the assets is an item, 2 cars wine, rolling, and that the value placed thereon is $12,000, and also to another item thereon, which is 105,000 gallons of wine, valued at $84,000.

The Court: That is that it be admitted in evidence? You are offering it now? Is there any objection?

Mr. Brookes: I have stipulated that is a copy of the original. Do I understand Counsel is offering the entire sheaf of documents there which he has already identified as an Exhibit O? [113]

Mr. Marcussen: No, I merely identified the exhibit which is now offered, namely, Exhibit P for identification as a copy, the true copy, of one appearing in Respondent's Exhibit O, for identification, which has not been offered in evidence.

Mr. Brookes: And I have stipulated that is a true copy of the original which appears in there.

Mr. Marcussen: Yes, and which was identified, this having been identified by Mr. Particelli, as the one which he signed.

Mr. Brookes: May I ask the date on that?

Mr. Marcussen: July 7, 1943.

The Court: They will be admitted as Exhibits P and O.

(Whereupon the documents marked Respondent's Exhibits O and P for identification were received.)

Mr. Marcussen: Your Honor, I now ask Counsel to stipulate that the records of the Bank of Sonoma

(Testimony of Giulio Particelli.)

County show the following deposits to the account of the Petitioner:

June 22, 1943	$4,255.90
June 25, 1943	4,849.50
June 29, 1943	5,283.40
July 8, 1943	4,883.30
July 12, 1943	5,279.25
August 23, 1943	5,305.70
August 27, 1943	4,259.90 [114]
August 27, 1943	4,325.90
August 27, 1943	4,243.30
August 27, 1943	4,258.70
August 31, 1943	4,856.10

May that be stipulated?

Mr. Brookes: It is stipulated that according to the bank records, those deposits were made in that amount on those days.

Q. (By Mr. Marcussen): What was the total capacity of your winery in December, 1943?

A. I can't tell you exactly the capacity. It would run 270,000, 275,000 gallons, 280,000 gallons; I don't remember exactly the gallons.

Q. Is that in storage tanks or fermenting tanks?

A. Storage tanks.

Q. Storage tanks?

A. Yes.

Q. Referring now to the 275,000 gallons that were sold to Tiara in that month, how much of that wine was in your winery?

A. Well, some wine in the Scatena Winery, Healdsburg, see, I crush a little bit more, the one

(Testimony of Giulio Particelli.)

I expect are already bought, and I don't have no more storage tank and I call up in Scatena to give me a favor to me storage of wine. [115]

Mr. Marcussen: Now, Mr. Reporter, will you read that answer back, please?

(The last answer was read by the reporter.)

Q. (By Mr. Marcussen): How much did you put down there at Scatena?

A. I forget if 18 or 20 or 24,000 gallons.

Mr. Marcussen: If Your Honor please, the stipulation shows that there was 19,000 gallons at the Scatena Winery and 256,000 gallons at the Petitioner's winery.

Q. (By Mr. Marcussen): You said you blended some wine? A. Yes.

Q. In 1943? A. '42, '43.

Q. '42 and '43? A. Yes.

Q. And that was wine that you purchased?

A. Wine I buy out in some other winery.

Q. And that was either then from Italian Swiss Colony—— A. Or Petri Winery.

Q. Geyserville——

A. Geyserville Growers, Garretto Winery, Napa.

Q. By the way, did you purchase wine from any other sources except the sources you mentioned this morning and the addition of that Garretto Winery?

A. Italian Swiss Colony, at Healdsburg, Foppiano Winery, two miles before you get to Healdsburg in the left hand side.

Q. Yes, that's all right. We just want to get the names straight. All right, we have Italian Swiss

(Testimony of Giulio Particelli.)

Colony, Petri, Foppiano, Geyserville Growers, Garretto, and any others?

A. I don't remember any more.

Q. Now, for blending purposes, what kind did you buy? A. Dry wine.

Q. And was that finished wine?

A. Finished wine.

Q. It was finished wine? A. Yes.

Q. You took finished wine and put it in with your unfinished wine?

A. Yes, because it gives you a taste. Otherwise, you can't sell it.

Q. Do you know whether that is the usual process? A. What?

Q. Do you know whether that is usually done, to mix finished wine with unfinished wine for blending?

A. Finished wine has got a lot of work done before it would be finished wine.

Q. Doesn't the blending process usually take place later, don't you blend just before the final filtering?

A. At the filtering, they got the blending. You got to [117] have chemicals for blending wines. You have to have a man that studies chemistry—analyze—a man that knows the business. He has to be in school.

Q. Is your testimony that it is necessary to have a chemist analyze the wine and study it to determine how to blend it, is that it?

A. If you want a real finished wine, yes.

(Testimony of Giulio Particelli.)

Q. In 1943, when did you start crushing?

A. Oh, I can't tell you the day, around the 20th, 25th of September or the 1st of October, one or the other one was starting.

Q. And did you make—go around the countryside before that, and make contracts with growers for the purchase of their grapes? A. Yes.

Q. And you specified the price that would be paid for those?

A. Yes, I tell them we pay just as much as the other winery pay, pay just as much as the other winery pay.

Q. By that, do you mean that you agreed with them to increase the price to the highest price that would be realized?

A. If we want to wait to see the other winery how much they pay, if they pay 80—if they pay 80—we pay 70. A lot of them they don't do that, they want to know how much they will give me. [118]

Q. I think you stated this morning that you crushed during that season and paid a high price for grapes. By the way, what was the price you paid for grapes? I don't think you did testify to that.

A. Well, I paid just as much as Petri and the other wineries paid, 77, 50, 70, up to 95, white grapes.

Q. A ton? A. Ton.

Q. And I think you testified this morning that you did that because you expected that the O.P.A. price ceiling would be raised?

(Testimony of Giulio Particelli.)

A. Everybody expected the O.P.A. price is going to be raised.

Q. And I suppose everybody was waiting for the O.P.A. to come out with the price increases, is that correct? A. What?

Q. I suppose everybody then in the business and you in particular was waiting for those announcements to come out from the O.P.A., is that correct?

A. They never raised the price, never moved the price.

Q. But they came out with a statement in the fall of 1943, didn't they?

A. I don't remember. I know they don't move the price, and that is the way I sold my wine because I owe too much money at the bank. I have a mortgage and I scared they going to take [119] me over.

Q. Did you talk the subject over freely with other wineries and other people in the winery business of what the O.P.A. was going to do?

A. Well, everybody know just as much as I know.

Q. Did you know just about as much as everybody else knew?

A. I think Italian Swiss Colony know more than I do, they are bigger.

Q. They would know more, but I am talking now about the smaller wineries like your operation.

A. We never, I never go to meeting.

Q. Did you talk it over with your colleagues, did you ever talk the subject of the O.P.A. prices

(Testimony of Giulio Particelli.)

over with any other vineyardist up there?

A. I never talk nobody about the price. We wait for them to move the price high.

Q. How did you find out they were waiting for the price, did you talk it over with them?

A. No, if I sold my wine—after I sold my wine, I never talk to anybody no more.

Q. Well, did you know then that the O.P.A. came out with an announcement on October 1, 1943? A. No.

Q. You didn't know, did you, that the ceilings were set [120] in that announcement at 28c, a flat ceiling for red wine, and 33c for white wine?

A. I talk to the other wineries, 28c the ceiling price, before I sold my wine. I want to be sure; I come down and in my accountant's office, George Oefinger——

Q. I'm not talking about that now. Now, you stated, I think you said, you started crushing toward the end of September, the latter half of September. When did you finish?

A. I don't remember. We didn't finish the crushing until October. We still crush little, a few ton, in November, I think, I don't remember.

Q. Now, approximately how much was red, how much of your crush went into red wine and how much into white wine?

A. I don't make much white wine. I think the inventory of the white wine I have in the winery, around 19 or 20,000 gallons, 21, or something like

(Testimony of Giulio Particelli.)

that. It is no much white grape in that part of Forestville.

Q. Now, I would like to have you refer again to your conversation with Mr. John Dumbra, about the sale of your wine. You went down to Santa Rosa to talk to him?

A. Well, if I go down to Santa Rosa, he want to talk to me to buy some wine.

Q. Yes.

A. And I told him I just come home from Fresno. "You come up tomorrow morning, and down Forestville and we can talk [121] some business."

So what you know, "Why don't you come down tonight after you have your soup, I here already in Santa Rosa," and he say, "After you have your soup, we have a highball together and we talk about business."

Mr. Marcussen: Just hold it there. Mr. Reporter, will you read back the answer, please?

(The last answer was read by the reporter.)

Q. (By Mr. Marcussen): Will you go on from there? A. Yes.

Q. Then you went down to Santa Rosa?

A. I went down to the Santa Rosa Hotel and asked for Mr. Dumbra. I never know him before, and he show him. He is down in the lobby, and I just present myself and I tell him, I am Mr. Dumbra and I am Mr. Particelli, and we go in the bar and have a drink, a highball, and he say,

(Testimony of Giulio Particelli.)

"I want to buy some wine from you," so all right, we go——

Q. What was that?

A. If we go together, maybe I am going to sell to you.

Q. What do you mean, "if we go together," if we get together?

A. If buy all. I told, "If you buy all, say how much you want, no use asking me how much you want. You know pretty well we have a ceiling price on, if you take all I will let you [122] have it for the ceiling price, but you have to take the lees, you got to pay me each gallon my inventory. I mean the inventory I have on hand, and if I lost too much wine in shipping or cloudy or so, I want to be paid for all things."

Q. In other words, you insisted that you be paid for the gallonage of your total, your total gallonage that it was in the winery and any loss in shipment and any loss from the time of the sale to the time of the shipment, that was at the expense of Tiara? A. Yes.

Q. And you then and there agreed to sell to him at the ceiling price? A. Yes.

Q. And then later on he asked you—strike that. Then, did you sign anything, any agreement with him right then and there for the sale of the wine?

A. No, because I come down the next day. I want to ask him advice of my accountant, George Oefinger.

Q. George Oefinger? A. Yes.

(Testimony of Giulio Particelli.)

Q. And you went to his office then?

A. Yes.

Q. And you had, when you went to his office you had agreed to sell your entire——

A. I want to find out how much the ceiling price to be sure. [123]

Q. Then you weren't going to ask any more, is that right? A. Yes.

Q. So that you were quite willing then to sell him your entire stock of wine at the ceiling price?

A. Yes.

Q. Which you understood to be 28 cents, is that correct? A. Yes.

Q. That is your testimony?

A. Yes, that's what I sold for, ceiling price, and I told him it to be 28 cents.

Q. Now, I think you testified a little while ago that you went into all of this crushing because you expected the O.P.A. to do something about the ceiling prices, to raise them?

A. Everybody expected they were going to be raised.

Q. Then who did you sell in December for 28 cents a gallon?

A. Because I be scared the bankers is going to take me over. I have to pay a lot of interest to the bank every month and I owe over $75,000.

Q. If the bank took you over, you couldn't do any worse, could you, to get 28 cents?

A. They take everything because they have the mortgage, the whole thing.

(Testimony of Giulio Particelli.)

Q. You weren't willing to wait? [124]

A. Well, I can't sleep nights. I owe too much money to the bank, and I want to clear it up.

Q. What do you figure that wine cost you to produce?

A. Well, cost around 50 cents, 52.

Q. Yes, and by the way, you spoke about finishing. What does it cost to finish wine?

A. I never finish wine. I no have no idea how much it cost for finish wine.

Q. Did you ever have any wine finished for yourself?

A. I bought some from the other wineries.

Q. No, did you ever take any of your own wine that you crushed and have it finished by someone else?

A. I have around 20,000 gallons and we sent it to Geyserville Growers for finishing.

Q. When was that?

A. I think in 1943.

Q. Yes, and what did they charge you?

A. I think they charge me 5 or 6 cents a gallon for finish.

Q. 5 or 6?

A. And besides I have to pay for bringing it down there, and go and get it again. You know, in the tank car, and I think they charged me two cents and a half each gallon to Forestville to Geyserville.

Q. How far from Forestville to Geyserville. [125]

(Testimony of Giulio Particelli.)

A. I think 25 miles, around 25 miles, less or more.

Q. You were so worried about your bank loans that you were quite content to sell your wine at 28 cents? A. And pay the bank off.

Q. That cost you 52 cents to produce?

A. I don't know exactly how much it produced. I don't know exactly, around 50 or 52 cents.

Q. That is what you estimated a moment ago. How much did you owe the bank at that time?

A. Exactly, amount is over $75,000. I know, I don't know if it $76, $77, or $75,000.

Q. And then later the next day, Mr. Dumbra came to you and said, "By the way, would you like to sell the winery too," is that what he said?

A. He told me on the same day, "if I wanted to sold the winery."

Q. And you asked him $300,000?

A. $300,000.

Q. Now, you are certain that you didn't make a deal for a total price of $350,000 right in the beginning?

A. No, we make two deals. The wine one price and the winery the other.

Q. Yes, your recollection is absolutely certain about that.

A. What did you say? [126]

Q. Your recollection is quite certain about that, isn't that right?

A. I make one deal for the winery and one deal for the wine.

(Testimony of Giulio Particelli.)

Q. What did he say about the winery, Mr. Dumbra?

A. He don't say nothing, they intend to move to California, and they say, "I bought one already down south and I like to have one here in the north for dry wine."

Q. Do you know Mr. Gould here, sitting at the table with me? A. I don't recognize him.

Q. Do you remember him at all? A. No.

Q. Do you recall that an Internal Revenue Agent came out to investigate the amount of your tax liability?

A. When they come they go down to the office and my daughter——

Q. And did you talk with the Revenue Agent?

A. Some time he comes down in the winery and I say to him, what he want, and I had him to check in the winery.

Q. Well, then, the answer is yes, you did talk to a Revenue Agent about your tax liability, is that correct?

A. They come and see the inventory, and come and see the—see the stamp that we have on hand. I can't answer this one, I send him down to the daughter in the office. [127]

Q. Are they the Alcohol Tax Unit people?

A. What?

Q. Were they the Alcohol Tax Unit people or Income Tax people?

A. Nobody never come, nobody from the Income Tax in my office.

(Testimony of Giulio Particelli.)

Q. You never talked to anybody about your income tax liability, that is, no Internal Revenue Agent that you know of?

A. He never come to see me.

Q. And I point out Mr. Gould sitting here at the end of the table and ask you whether you ever had a conversation with him.

A. I—one man come, I don't know if he is him. He come down to Rincon Valley, you know, after I move in the Rincon Valley. I there work at the yard, and he ask me if I have my books down there.

Q. Then you did talk to someone?

A. For the winery, and I said no, the books, and I tell him I have it down in the barn, and the old man, he helped brought them up home. If they want it only thing to come down to Mr. Goerge Oefinger down to the bank, they have the escrow to the deal.

Q. At the time he came to see you then, did you make any statement to him that you could buy back that winery for $50,000?

A. No, I never said. [128]

Q. In 1944? A. I never say nothing.

Mr. Brookes: Your Honor, I objected and I was overruled as to the scope of this cross examination and, in deference to that ruling, I have foreborne from repeating my objection, but I can't help but wonder how long this is going to go on, and if Counsel intends to cross examine Mr. Particelli much longer, I think I must ask that the case be adjourned for today until tomorrow. Mr. Parti-

(Testimony of Giulio Particelli.)

celli has been on the witness stand since 10:30 except for about an hour and a half recess, and, if he is human, he is tired, and when people get tired, if their memory doesn't begin to fail them, they differ from myself. Mr. Marcussen has asked him about everything except the name of his mother. It is quite a test of mental agility to follow the route over which he has taken him. May I ask the Court to instruct Mr. Marcussen to terminate the cross examination at some reasonable period or else the Court adjourn for the day?

The Court: Well, I wouldn't assume the responsibility of controlling the conduct of Counsel in trying the case. Of course, I think a lot of this examination is outside of the scope of the examination in chief. The only reason I overruled you was that it made no difference whether it was cross examination or direct examination, and if he examined him as such, he would be an adverse party and the answers he gave would not be [129] binding on the respondent. It seems to me that it's of little significance whether it is cross examination or examination in chief of his own witness. On the other question, I don't think—he looks like a pretty rugged specimen to me. I think he can hold up for the usual time for the court hours here. Of course, I am interested in having the cross examination—having the examination terminated but only in the interest of getting along with the case. I am not going to assume the responsibility of telling him when he should quit.

(Testimony of Giulio Particelli.)

Mr. Marcussen: Thank you, your Honor. I might say, I think I am drawing to a close rather shortly. There has been the added difficulty of understanding the witness.

The Court: Yes, I appreciate that.

Q. (By Mr. Marcussen): Referring to the sales at your store, Mr. Particelli, in bottles, could you describe those sales again? Were they to restaurants and people who were interested in buying a gallon or two of wine?

A. We don't sell bottles there, nothing. Sometimes he sells one gallon or two gallons. We don't sell nothing in the small town of Forestville, and finally if you find out, I take the whisky license and I just had it for one year and I give it up because it don't pay. It's too small town for liquor store.

Q. When did you operate the liquor store?

A. I think in 1942, '43. [130]

Q. For a total period of about a year covering both years? A. We just try one year.

Q. It's '42 or '43?

A. '42 or '43, I think the two years. The liquor license we don't sell nothing.

Q. Now, my question was with respect to wine, bottled wine. You sold bottled wine at that store, didn't you? A. In bottles, we sell, yes.

Q. Did you sell bulk wine at that store too?

A. No.

Q. What other merchandise did you sell at that store?

(Testimony of Giulio Particelli.)

A. We sell beer, wine, coca cola, soda water.

Q. Now, the sweet wine that you purchased from the other wineries——

A. We sold some bottles.

Q. And did you bottle most of that yourself?

A. Yes.

Q. Did you sell any of that sweet wine at wholesale? A. Wholesale?

Q. Yes. A. Yes, for the bar.

Q. Where? A. Bar, grocery store.

Q. That is locally, in town? [131]

A. In Vallejo, Napa, Sonoma, San Rafael, Fairfax, we have a truck go 'round and deliver.

Q. And what was the average sale, do you recall?

A. Average sale you mean?

Q. Yes. Average. You know, about how many gallons would you sell at a time?

A. Oh, some buys two gallons and some buys ten gallons, some buy five gallons, you know. We passed through every week and they buy what they use. Sometime one gallon, three gallon, sometime it's twenty gallon.

Q. And all of the sweet wine was sold in that manner, wasn't it?

A. Yes. Maybe a few bottles we sold in the retail store too.

Q. Yes, and I want to ask you again whether you can refresh recollection in any way about how much of the dry wine did you sell in the store, and how much did you—referring now to your purchases of dry wine—how much of that did you sell

(Testimony of Giulio Particelli.)

in this manner through the store?

A. You mean retail store?

Q. Yes.

A. Sometimes we don't sell one gallon a day.

Q. Now, but let's assume that you purchased —let's assume that you purchased a hundred gallons from Petri of dry wine. You testified that you purchased some for blending [132] purposes?

A. Yes, I bought this in bond. The one I bought for blending and I bought in bond.

Q. Was most of the dry wine that you purchased from other wineries used for blending purposes? A. No, we bottle.

Q. You bottled some of it? A. Yes.

Q. And you sold it in the same manner that you described a moment ago?

A. The sweet wine.

Q. At the store and also in the surrounding countryside? A. Grocery store.

Q. Bars? A. Yes.

Q. People like that? A. Yes.

Q. Do you have any idea how much, what proportion of the purchases of dry wine that you made from other wineries was sold in that manner and how much went into the blending with your wine?

A. No, I no use much for blending. I just—it just for blending mostly this wine I sold for this Sunset in Ohio, and the rest, I don't know, no going to buy old wine for blending when I can bottle down in the bottling place. [133]

Q. Why not? A. No pay.

(Testimony of Giulio Particelli.)

Q. Too expensive? A. Too expensive.

Q. So that there was only a small proportion of your purchases of dry wine for blending, is that correct?

A. Yes, and the rest, I buy in tax paid containers. You gave me a 50 gallon, 25 barrels, and we put them in bottle, gallon, half a gallon, quart.

Q. And sell it through the store in the manner that you have described?

A. Grocery store, bars.

Q. Now, you recall that you estimated that your sales to this Ohio concern were about 50,000 to 60,000 gallons?

A. I say I don't know for sure how many.

Q. Yes, I know, but that is your best estimate?

A. It might be more, yes.

Q. But that is—that is approximately correct?

A. It may be more, I forget how many carloads I sent.

Q. Now, what proportion of that 50 or 60,000 gallons or more that you sold constituted wine that you had purchased from other wineries and had blended in with your own wine?

A. I pour about 100 gallon each thousand gallon, just for give it a little flavor, old wine.

Q. Now, referring again to the sweet wine, do you have [134] any idea of what proportion of the wine you sold through your store was sweet wine that you had purchased elsewhere and what proportion was dry wine?

A. Well, at first, when we started, we sold more,

(Testimony of Giulio Particelli.)

pretty near more sweet wine than dry wine. After the 1942, the wine, dry wine would sell increase a little more than sweet wine, but I don't get the idea of how many gallons I sold every day or every week.

Q. Did the sales of dry wine after 1942 and into 1943, I think you said when they increased, did they ever exceed the sales of sweet wine?

A. What did you say?

Q. Were they more, eventually, did they become more than the sales of the sweet wine?

A. In 1942, and 1943, it increased and the sell in the dry wine, more sweet wine.

Q. More than sweet wine?

A. Yes, we sold more dry wine than sweet wine.

Q. Now, on the sweet wine, what would you pay for that sweet wine?

A. Well, it's the changing price, pretty near every month, Italian Swiss Colony 69 cents, and plus tax.

Q. What was the tax, what was the Federal tax?

A. I think it was 22 cents a gallon, on sweet wine.

Q. Plus tax. And I think you testified you sold that [135] wine for $1.25 a gallon?

A. $1.25, $1.20.

Q. And the dry wine you would sell for about $1.10 a gallon?

A. I said the high grade wine, I buy from

(Testimony of Giulio Particelli.)

Italian Swiss Colony, in—this is a high grade wine I have it.

Q. And then the Petri wine you sold for about 45 cents, is that what you said? A. 45, 48.

Q. And the Geyserville the same?

A. Yes, same.

Q. Now, what proportion did you buy from each one of those, do you recall?

A. Well, I can tell you how much I buy. Sometimes one week maybe I buy a thousand gallons, next week I don't buy nothing.

Q. Over a period of a year?

A. I don't get the idea.

Q. Over a period of a year, did you buy more of your sweet wine, we will say, from—or, rather, your dry wine, from Swiss Colony?

A. Mostly all the sweet wine is coming from the Italian Swiss Colony.

Q. But how about the dry wine?

A. Is also dry wine I buy, from Italian Swiss Colony for [136] high grade wine.

Q. And what proportion of your sales then, for your purchases of dry wine were the high grade wine, from Italian Swiss Colony and what proportion of your purchases constituted the lower grades from Petri and Geyserville?

A. Well, high grade wine, we don't sell much of the cheap wine we sell.

Q. What did the high grade wine from Petri cost you?

A. I never buy, I just buy one brand from

(Testimony of Giulio Particelli.)

Petri, the red wine. I don't buy any high grade wine, just the one kind.

Q. Did I say Petri? I beg your pardon. I meant Italian Swiss Colony.

A. I buy Burgundy, one price, Zinfandel, Sauterne in another price. I forget how much I paid for one of them and the other.

Q. They were in a fairly close range of each other?

A. They have everything in the records there, how much I paid, and how many gallons I bought.

Q. I am talking about Italian Swiss Colony now, where you bought your high grade dry wine.

A. All my high grade wine is coming from Italian Swiss Colony.

Q. How much did you pay for a gallon on an average? A. It's different kind. [137]

Q. Just take each kind then, please?

A. I don't remember exactly how much I pay. The Burgundy and Tipo we pay up to 65, 70 cents a gallon. That is a real finished wine to pour in the bottle.

Q. This is the high grade wine that you are buying from Italian Swiss Colony? A. Yes.

Q. And which were the cheaper brands that you bought from—which brand was the cheaper brand of those high grade, less expensive brands?

A. Italian Swiss Colony?

Q. Yes.

A. This also finish wine because we got the Claret is five cents more cheap, or ten cents more

(Testimony of Giulio Particelli.)

cheap than Zinfandel. Zinfandel is five cents cheaper than Burgundy. All finish wine and age wine.

Q. All right. What was the cost of the most expensive?

A. Well, around 65, 70 cents. The dry wine?

Q. The dry wine. Now, what did the wines that you purchased from Petri, what did they cost you?

A. I forget how much we paid. This is no old wine, just the new wine.

Q. Current wine, is that it? A. Yes.

Q. And that is the wine that you sold at 45 cents a [138] gallon?

A. 34, 35; I forget how much I paid for it.

Q. You were just mentioning the prices that you paid? A. Yes.

Q. 30 or 35 cents? A. 34, 32; I forget.

Q. Now, how about Geyserville?

A. Same price pretty near, they sold the same price, and also for Foppiano.

Q. The wine that you got from Foppiano, was that a high quality? A. No.

Q. That was the same quality as Geyserville?

A. Just common wine.

Mr. Marcussen: If your Honor please, that concludes the cross examination, and I would like to ask, however, that the taxpayer be bound over for possible further cross examination as the case goes along.

The Court: I imagine he will be here, it's his case.

Mr. Brookes: Your Honor, I have some redirect.

(Testimony of Giulio Particelli.)

I would estimate that I might finish it within 15 minutes or 20 minutes. Shall I continue?

The Court: I think it would be well for you to proceed now. [139]

Redirect Examination

Q. (By Mr. Brookes): Mr. Particelli, when you were speaking of the prices that you paid for wine in answer to Mr. Marcussen's questions, did those prices include tax? A. No.

Q. Did you pay the tax on top of those prices or was this bonded wine?

A. No, they made the bill so much for wine and so much for tax.

Q. Did I understand you to say that the carload lots of wine which you sold to the Sunset Winery in Ohio consisted of blended wine?

A. Yes.

Q. Did I understand you to say that that consisted partly of your own wine? A. Yes.

Q. And partly of wine—finished wine which you had purchased elsewhere? A. Yes.

Q. Can you describe the transaction in which you came to sell that wine to the Sunset Winery?

A. How much I sold?

Q. No, can you describe how you came to sell it? I am trying to find out whether the correspondence, whether he came [140] to see you.

A. They come to see me, down at Forestville, looking for wine.

Q. Did you agree upon a price per carload lot?

(Testimony of Giulio Particelli.)

A. Yes.

Q. At that time? A. Yes.

Q. Was the price measured in gallons or carload lots? A. Carload.

Q. Carload did you say? A. Carload.

Q. Did they specify what percentage of the wine should be your own wine and what percentage should be finished wine?

A. Like I say, I poured you every thousand gallons 100 gallons finished wine.

Q. I asked you if they specified that you——

A. No.

Q. Do you have that in percentage?

A. No, he tested, put it in their mouth and they like, and we specified the price, and I started shipping about a week after.

Q. Was the wine which they tested the blended wine which was shipped them? A. Yes.

Q. It had already been mixed? [141]

A. Already mixed.

Q. Marcussen asked you if the sales to the Sunset Winery were the only sales that you made of your own wine in 1943 in bulk. A. Yes.

Q. And you answered "yes." Did you remember that was the question that you were asked and that was the answer you gave?

A. In tank car lots.

Q. Do you describe sales in five gallon lots, ten gallon lots and 25 and 50 gallon lots as in bulk?

A. As in bulk?

Q. Are those in bulk? A. Yes.

(Testimony of Giulio Particelli.)

Q. Did you in 1943 makes sales of your own wine in 5, 10, 15, 20 gallon lots?

A. 5, 10, 15, 100 gallons, yes.

Q. This morning, in answer to a question of mine, as I recall it, you testified that when you sold your own wine made by you, in 1943, in bulk that you sold it for prices of 32 to 40 cents a gallon including the tax? A. Yes.

Q. When you made that statement, were you referring to the wine which you sold in 5, 10, 25 and 50 gallon lots?

A. We sold in 50 gallon lots, say sold 32, 34 cents. [142] If he buy 25, we want 2 cents more. If he wanted 10, we still charge few cents more, gradually, the lesser he gets more work; washing container, and everything else.

Q. You testified during Mr. Marcussen's examination that you—that after you had entered into the sale of wine to Mr. John Dumbra you withdrew 1,000 gallons of wine? A. Yes.

Q. Do you remember the—approximately or exactly—if you remember, the time when you withdrew that wine?

A. I during the—during December, I forget what day.

Q. Was this 1,000 gallons of wine, wine which you had made yourself?

A. No, this was high grade wine I bought from San Francisco, and we call it Burgundy.

Q. Was it old wine?

A. It was the best wine I had in the winery.

(Testimony of Giulio Particelli.)

I take it for myself to drink myself, and I still have some.

Q. Had you been selling wine of this sort before the sale to Mr. Dumbra? A. If I sold?

Q. Had you been selling this same type of wine before you sold to Dumbra?

A. This is the same wine we sold for $1.10, $1.20 in gallon.

Mr. Marcussen: Will you read the last answer back, [143] please.

(The last answer was read by the reporter.)

Q. (By Mr. Brookes): Mr. Particelli, you referred to the fact that some of the wine which was in the winery when you sold it to Mr. Dumbra consisted of lees? A. Yes, it all has lees.

Q. What would you estimate is the amount of lees which was in the winery at the time of sale?

A. At the—racked all the wine, I measure Mr. Dumbra of around 20 to 25,000 gallons less.

Q. Was that at the time of the sale to Dumbra?

A. No, at the time I sold to Dumbra I only had about 6 or 7,000 gallons of lees.

Q. And when was it when there was 20,000 gallons of lees?

A. After the Dumbra, they ship all the wine from the East, I measured; I can prove it because I don't ship all the wine. I measured around 20 to 25,000 gallons between loss and lees.

Q. That was after you shipped to Dumbra?

A. I ship?

Q. At that time about 20,000 gallons of lees, that

(Testimony of Giulio Particelli.)

is what you meant to say? A. Yes.

Mr. Marcussen: Do I understand, Counsel, that he [144] testified that at the time of the sale in December, he estimated there were 6 or 7,000 gallons of lees?

Mr. Brookes: Yes. There is nothing inconsistent there, Counsel. I can't testify, Your Honor, but I know what he means. In the process of racking and filtering the wine, lees are produced, lees is the dregs in the tanks, and, before shipping wine, it is filtered and it is racked, and lees form in the process there. He has testified that there were about 6,000 gallons of lees in tanks at the time of the sale to Dumbra. That was on December 6, when the agreement of sale was signed. He has testified that there was a very large amount. The record shows what it was, of unfinished raw wine there. When he stated that there was 20,000 gallons of lees after he had finished the shipments East, that would be referring to the fact that wine had been racked and filtered in the meantime and that there were more lees in consequence because that was the sediment which had been filtered and racked out of the wine prior to shipment. Do you wish me to put this in the record, do you understand the explanation?

Mr. Marcussen: You may make the statement, Counsel, statements aren't evidence.

Q. (By Mr. Brookes): Mr. Particelli, what was the date, approximately or exactly, if you can remember, when you found there were 20,000 gallons of lees? [145]

(Testimony of Giulio Particelli.)

A. Before I give the key for Mr. Dumbra.

Q. When did you give the key?

A. First of May.

Q. May of '44?

A. I still have some wine for shipment.

Q. And when was it that you estimated there were 6,000 gallons of lees?

A. When I sold the wine to Dumbra.

Q. And when was that, what date?

A. It was in December.

Q. Of what year? A. 1943.

Q. How did the additional 14,000 gallons of the lees get produced?

A. Well, you start one tank and fill the bulk tank in the railroad track and sometimes you have so much lees in a barrel, you can't put the lees in the wine because it going cloudy. It's going to spoil the wine and that is why we pump it all in one tank. We pump all in one tank, and there some will be sold for distillery material and some destroyed. They don't pay much for the distilled material, 4 or 5 cents a gallon. Sometimes, and you got to haul to Italian Swiss Colony or some other winery.

Mr. Brookes: Is that to your satisfaction?

Mr. Marcussen: I think it would be to your [146] satisfaction, Mr. Brookes, not mine.

Mr. Brookes: I am satisfied that this is a matter which can be established within judicial notice. This isn't something particular to his wine. This is a technical fact which is common to all wineries, and in any treatise or text, including the reference

(Testimony of Giulio Particelli.)

in the Encyclopedia Brittanica which I made earlier, that is made in full.

Q. (By Mr. Brookes): In the course of finishing wine, Mr. Particelli, is there as a result of the production of the lees, a loss in the amount of wine? I mean, do you have less when you get through finishing it than when you started?

A. We lost every year, we lost first year, new wine, the first year, we estimate we lost about 5 per cent, and the second year, two year old wine, it goes for 2, we estimate we lost around 3 per cent, and when the wine is coming over three years old estimate about 1 per cent. That is the way we estimate on the wine.

Q. In your examination by Mr. Marcussen, you referred to the bottling plant down to the store, and you stated it was at the store where you bottled the wine, the bottling plant being there and from which you sold the wine which you sold in bottles, and you referred to demijohns. Did you sell the store and the bottling plant to Dumbra, to Mr. Dumbra? A. No. [147]

Q. At the time of the sale to Mr. Dumbra, was there any wine in the store?

A. Yes, some wine, I got from Italian Swiss Colony and some other wine I bought from the other winery, and also some beer.

Q. What did you say, that the wine which was at the store was some Italian Swiss Colony wine?

A. The wine we have in the store?

Q. I am trying to understand your testimony,

(Testimony of Giulio Particelli.)

Mr. Particelli. I asked you if there was wine at the store at the time of the sale to Dumbra? A. Yes.

Q. And you said, "Yes."

A. In the bottling place?

Q. Yes.

A. A few barrels of wine down there, I don't know how many barrels we have there.

Q. Was that wine which you had produced yourself?

A. No, it all wine that we bought from some other wineries.

Q. Mr. Particelli, during your examination by Mr. Marcussen, I understood you to tell him that the records relating to the production of the winery and your income tax records were kept together in boxes and that these were destroyed, but I also understood you to tell Mr. Marcussen that [148] they were commingled with old, useless papers. Did you —will you tell us what the fact is?

A. The fact I explained this morning, we move everything down to Rincon Valley in the barn. The other box among some other stuff and we had a lot of paper there and I told my old man to burn them up, all this old paper, and instead of burning up all the newspapers and things like that, he takes the two separate boxes which have all the records and he burn them up too.

Q. Were there any old, useless papers that you wanted burned in the boxes that contained the income tax records? A. No, all.

Q. I don't think you understood my question.

(Testimony of Giulio Particelli.)

Were there any old, useless papers which you wanted to have burned? A. Yes.

Q. In the same boxes?

A. Not in the same box.

Q. No, not in the same box, is that your answer?

A. This box was separate. They picked it up, this one too.

Q. Mr. Particelli, what is your age?

A. Fifty-nine.

Q. How many buildings owned by you or in your possession burned up in the course of your fifty-nine years? A. Three. [149]

Q. What dates did they burn? A. What?

Q. In what years did they burn?

A. Well, the first, my house, burned up in 1930.

Q. Then what?

A. After a little, chicken house, they burn him up in the daytime because man has a cigaret, a man work for me, his name is Johnny, he is still living, and when we see smoke, we jump down there, is in fire, the chicken house, 14 by I think 20, 14 feet wide, just a frame building, just one board on the outside; no finish inside.

Q. And what was the third one?

A. The third was a little store, we built along the highway. My daughter—used to go around working, picking apples, peeling apples, and I told her we build a little store on the highway. I have a shoe repair place there in Sebastopol, and I told her we build a little store on the highway, you can sell few bottles of beer, you can sell a few dozen eggs, you

(Testimony of Giulio Particelli.)

can sell box of apples, and maybe go to work for somebody else, and that is what I done.

Q. Did you discover what caused the fire to your dwelling in 1930?

A. We had been in town. I had a little shop in Forestville, the shoemaker there, and repair shop, and I got to go down there in the evening to work and my wife is coming too, and [150] my daughter, she stay in the neighborhood there about a half mile away from my house, and this in 1930, fifteen years old and when the old lady that goes in my little store there, is my wife passed away, come and say, "I want to come too."

I cut my hair in the barber shop, and I have a key for closing my little store, and I see machines coming, and my daughter started howling, "Daddy, Daddy, the house is on fire," and when we reach there we can't go across. We lose everything we have.

Q. Did you find out the cause of the fire, what was the construction of the house?

A. A wood house.

Q. And the chicken coop that burned was constructed of what?

A. It's just a chicken house.

Q. Of wood? A. Yes.

Q. And the store?

A. Just a grocery store. It's old.

Q. When you moved from the winery after the sale to Mr. Dumbra and the Tiara Products Com-

(Testimony of Giulio Particelli.)

pany, did you leave any of your records at the winery?

A. We left in store Mr. Dumbra to have the name; left it in the office in the scale house office where the name. Next year if they want to contact the growers. [151]

Q. What was the nature of this record that you are referring to?

A. Just to bill, what we bought the grapes from Mr. So-and-so, and Mr. So-and-so, and so on. I think we left this one for Mr.——record for Mr. Dumbra.

Q. What were the records then which you took with you when you moved from your home in Forestville to Santa Rosa?

A. All this 702, 701, all the books that we have to the Government. All the bills we pay.

Mr. Marcussen: 702 and 701 is the Alcohol Tax Unit records?

The Witness: Yes.

Mr. Marcussen: Showing the amount of grapes you crushed?

The Witness: Yes, everything.

Mr. Marcussen: And the amount of land you got out of it?

The Witness: Every month we have to fill up the form, 702.

Q. (By Mr. Brookes): Mr. Particelli, you testified that at the time you were buying grapes in 1943, you hoped that the OPA would raise its ceiling prices? A. Yes.

(Testimony of Giulio Particelli.)

Q. At the time that you sold the wine in December of 1943, [152] did you still hope that the OPA would raise its ceiling prices?

A. Yes, the OPA is coming out and raising the ceiling prices, of course which they never do.

Q. I asked you if at the time of the sale to Dumbra in 1943, you still retained the hope that the OPA would raise its ceiling prices?

A. Yes, everybody hoped, everybody would think, but I got to pay a lot of the interest on my loan and I thought we had better sell the wine and pay my debts to the bank and this way I have my little ranch clear and the winery clear.

Q. Did you consult anyone or ask the advice of anyone——

A. ——my accountant, George Oefinger.

Q. ——let me finish my question. Did you consult anyone or ask the advice of anyone before—about ceiling prices before the time you sold to Dumbra?

A. I consulted George Oefinger.

Q. Did you ask him what the ceiling price was or was your question something altogether different?

A. I asked him to find out how much the ceiling price to be sure.

Q. Did you ask him whether there was any possibility that the ceiling price would be raised?

A. Yes. [153]

Mr. Marcussen: I object to this, if Your Honor please, as being very leading and rather an important point in the testimony. It seems to me he should be requested to state the best he recollects

(Testimony of Giulio Particelli.)

as to the full extent of his conversation with Mr. Oefinger.

The Court: You might bring out what discussion or advice was asked and what scope it covered.

Mr. Marcussen: Yes, I think that is quite true to ask that in the form of what the scope was.

Mr. Brookes: I am perfectly willing to do so. I am simply doing this to save time. I recognize the question is leading.

Q. (By Mr. Brookes): What was the scope of your conversation with Mr. Oefinger?

A. I told him, Oefinger, say I coming down. I want to see exactly how much the ceiling price be because I think I going to sold my wine to Mr. Dumbra.

Mr. Brookes: That is all, Your Honor.

The Court: Do you have one or two questions you want to ask?

Mr. Marcussen: Yes, I have, Your Honor.

Recross Examination

Q. (By Mr. Marcussen): When did you sell lees for 4 or 5 cents a gallon? [154]

A. I think in 1942, maybe 1943. I sell some 5, 6 cents a gallon. I think I sold some to Italian Swiss Colony.

Q. Did you know that the lees contain materials, tartrates, as I understand it, that were important for war purposes?

A. I know the lees were sold for the distillery to making brandy.

Q. During the war, did you know that the Gov-

(Testimony of Giulio Particelli.)

ernment was buying a lot of tartrade material, lees?

A. I never know the Government buy; I know Italian Swiss Colony and Petri buy.

Q. Weren't you familiar with the fact that lees in 1943—— A. What?

Q. Weren't you familiar with the fact that lees in 1943 were selling for anywhere from 20 cents a gallon up?

A. They pay, it goes by so much alcoholic content, they give me so much each alcoholic content.

Q. Where did you get that dry wine that you—finished dry wine that you used for blending purposes on that sale to the people in Ohio?

A. I think I get it from Italian Swiss Colony.

Q. The Italian Swiss Colony?

A. I think, I don't be sure, but I think I get some from Italian Swiss Colony. [155]

Q. You think you got some of it there?

A. From Italian Swiss Colony.

Q. Did you get any from Geyserville?

A. I don't know. I can't say where I did exactly. Know I bought some, I don't remember where I bought.

Q. You don't remember how much you bought from Italian Swiss Colony?

A. I don't know; I don't remember how much I bought.

Q. I am thinking now that you bought—didn't you buy about 6,000 gallons or so, was it in that neighborhood? A. Neighborhood?

Q. No, I mean was that about the amount?

(Testimony of Giulio Particelli.)

A. I don't know. I can't say how many thousand gallons I bought because I bought pretty nearly every week. I buy wine from Italian Swiss Colony.

Q. And you actually used a very high grade wine for the blending?

A. The high grade wine for the blending, you mean finished wine?

Q. Yes, finished.

A. Just a little bit to give it a good test.

Q. You just used a little bit to bring up the test of your own wine? A. Yes.

Q. And you got some of that wine that you blended with [156] your own, some of that from Italian Swiss Colony? A. Brandy wine.

Q. Yes, for blending.

A. I think I get some from Italian Swiss Colony, I don't know for sure.

Q. But you are not sure, you don't know where you got it, is that right?

A. I don't know if I have it from Petri, Geyserville Growers, that was eight years ago, seven years ago.

Q. Your testimony is then that you really don't know where you got it?

A. I don't know where I got it.

Q. Whether it was from Italian Swiss Colony or Geyserville or any of these others?

A. No.

Q. Do you have any recollection of what you paid for that wine?

(Testimony of Giulio Particelli.)

A. I don't remember how much I paid, because I bought in bond, no tax paid, I don't have an idea how much I paid for it.

Q. No idea at all what you paid for it?

A. No, it's about six, seven years ago, I don't remember.

Q. What was this figure of $1.00 or $1.25 that you testified to on your redirect testimony, when Mr. Brookes was [157] asking you some questions about that wine?

A. I testified $1.25?

Q. Yes, didn't you testify that some of this finished wine that you had purchased was high grade?

A. You mean I sold for $1.25, $1.10 and $1.25 high grade wine?

Q. Wine that you sold to——

A. The wine we put in the jug and sold for my high grade wine, I sold for $1.10, $1.20, and I bought it from Italian Swiss Colony, all my high grade wine, most of it, is coming from Italian Swiss Colony.

Q. And did I understand you correctly to say that the wine that you sold to the people in Ohio and sold at $1.10, $1.25.

A. Oh, no, I don't say that.

Q. Now, the wine that you sold to the people in Ohio, that was current wine, wasn't it?

A. My own wine, a part blended.

Q. Part blended to bring up to quality, is that correct? A. Yes.

Q. But it was still ordinary wine, is that cor-

(Testimony of Giulio Particelli.)

rect? A. Just a filtered one, and racked.

Q. I meant the resulting product as you shipped it out was still ordinary current wine of ordinary quality?

A. My wine, best wine I have in the winery.

Q. A slight boost from a little higher quality wine, is that what you mean to say?

A. Don't finish the wine, it's not a high grade wine. It's impossible because he doesn't finish his wine.

Q. Then you did not mean to say that the price you got for that wine was $1.00 or $1.25?

A. I don't remember.

Mr. Brookes: May I consult with Mr. Marcussen for a minute?

Mr. Marcussen: Certainly.

Q. (By Mr. Marcussen): Mr. Brookes says, or has stated to me, his understanding that you testified that the 1,000 gallons that you took out of the winery was wine which you later sold for $1.00 or $1.25, is that correct? A. Yes.

Mr. Marcussen: Counsel, will you state for the record what you understand the testimony to be, in respect to that?

Mr. Brookes: Yes, sir, Your Honor and Mr. Marcussen. I asked the witness about the 1,000 gallons of wine which he withdrew from the winery after the sale to Tiara Products and my understanding is that he testified that it was that wine which was old wine which he had purchased from the Italian Swiss Colony and which was of the

(Testimony of Giulio Particelli.)

same type that he was [159] accustomed to selling for $1.10 to $1.25 a gallon and further testified that he withdrew that 1,000 gallons for his own use and he still had some of it on hand, and I am confident the reporter's transcript, if he is asked to read that back, will show that is what the question and answer was.

Q. (By Mr. Marcussen): Did you understand Mr. Brookes' statement about your previous testimony? A. Yes.

Q. Now, when you referred to the sales of this wine, or referred to this wine as being the wine which you were accustomed to sell at $1.00 and $1.25, are you referring to sales in your store?

A. For wholesale, delivery, 5 gallons here, 5 gallons there.

Q. In the bottle? A. In gallons.

Q. In gallons? A. Yes.

Q. Bottles? A. Yes.

Q. What did you pay for that in bulk?

A. How many I pay in bulk?

Q. Yes.

A. I can't put any price, I think I pay pretty close to [160] 70 cents a gallon for that Italian Swiss Colony wine.

Q. Now, when you purchase dry wine from Italian Swiss Colony and from other places for the bottling and resale as a bottled product, was that tax paid wine or——

A. Every sweet wine I buy, I buy tax paid.

The Court: He is talking about dry wine.

(Testimony of Giulio Particelli.)

The Witness: Dry wine, sweet wine, it go in the bottling plant, is all tax paid.

Q. (By Mr. Marcussen): Now, on the wine, referring again to this 1,000 gallons that we are talking about, that you say you purchased from some of the other wineries, I think your testimony was you don't recall what wineries you got that from?

A. What?

Q. I think you testimony was that you can't remember what winery you purchased that wine from?

A. I still think it is Italian Swiss Colony.

Q. That is, you said before that it was some from Italian Swiss Colony, is that correct?

A. Most all of my high grade wine is Italian Swiss Colony.

Mr. Brookes: I don't know if Mr. Marcussen is deliberately trying to mix the witness up or if he is deliberately mixed up as the questions indicate. He has asked the witness about two separate batches of finished wine, and the [161] witness is trying his best to keep his answers distinct, but Mr. Marcussen keeps mixing him up. One batch Mr. Marcussen asked about was used in the blending which went in tank cars to this winery in Ohio, and I heard the witness testify it was with respect to that finished wine that he was unsure whether it came from Italian Swiss Colony, Petri or where. With respect to the questions which I directed to him, and then subsequently Mr. Marcussen, about the 1,000 gallons which the witness testified he withdrew and of which he still has some, his testimony has not

(Testimony of Giulio Particelli.)

been ambiguous or equivocable. He testified that it came from Italian Swiss Colony according to his recollection, and if Mr. Marcussen would put the question to him in a manner that would be consistent with what has gone into the record within the past two minutes, I think it would help keep the witness from getting unnecessarily confused.

Mr. Marcussen: I want to assure you, Your Honor, I am not attempting to confuse the witness, so I suppose I will have to suffer whatever disadvantages may accrue from any possible confusion that seems to appear to be in evidence to Counsel. I have asked two sets of questions and maybe he was confused on that one point.

Q. (By Mr. Marcussen): I am now asking you, Mr. Particelli, about the 1,000 gallons that was in the winery which you drew out. [162]

A. What?

Q. I am asking you about the 1,000 gallons in the winery which you drew out.

A. Yes, I draw out and bring to my home.

Q. Yes. Now, was any of that wine, wine which you had purchased for the purpose of blending with the wine—with your own wine for purposes of sale to Sunset?

A. This, I say the high grade wine is altogether different, Burgundy.

Q. That was Burgundy wine?

A. Burgundy wine. I still have one barrel, 50 gallon barrel, maybe two, I don't know. I have a few barrels in the basement.

(Testimony of Giulio Particelli.)

Q. And was that wine tax paid?

A. Tax paid, tax paid, you mean tax paid now?

Q. Was it tax paid when you purchased it?

A. No, in bond.

Q. In bond?

A. Yes, this way I have in the winery, I can't keep in—wine in the winery if it no be in bond, and tax paid I keep that in the bottom place.

Mr. Marcussen: If Your Honor please, if you will excuse me just a moment, I would like to confer with someone.

That is all.

The Court: That is all, Mr. Particelli. [163]

Mr. Brookes: Before the witness is dismissed, perhaps if I could ask one question it might clear up the confusion which has been evidenced. If it can't be done in one question, I will give up. May I ask this one question?

The Court: Yes, you may. Let me express the hope it won't open up anything.

Mr. Brookes: It treats on the last question Mr. Marcussen asked.

Further Redirect Examination

Q. (By Mr. Brookes): Was all the wine which was in your winery bonded?

A. All bonded in the winery, all bond.

Q. Was all the wine which was in your bottling plant tax paid? A. All tax paid.

Mr. Brookes: That is all.

The Court: That is all. We will adjourn until

10:00 o'clock tomorrow morning.

(Witness excused.) [164]

* * * * *

Court Room 421 Appraisers Building,
San Francisco, Calif. Thursday, May 18, 1950

* * * * * [165]

PHILLIP BRANGER

called as a witness on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Phillip Branger, 4293 Bennet Valley Road, Santa Rosa.

Q. (By Mr. Marcussen): Do you own the Lucca Winery at the present time, Mr. Branger.

A. Yes, sir.

Q. When did you buy it?

A. In '45, 1945.

Q. December of 1945?

A. Yes, it was in the early part, I believe it was in December.

Q. When you bought the winery, did you find certain records there? A. Yes.

Q. I hand you Respondent's Exhibit Q for identification, [167] consisting of a number of file folders, held together by a large rubber band, and ask you whether they are part of the records you found there? A. Yes, they are.

Q. What are they?

A. These are grape vouchers that were made pre-

(Testimony of Phillip Branger.)

vious to the time that I bought the winery, and I found that in the office when I bought the place.

Q. Are there also contracts in that file?

A. Yes, contracts.

Q. For grapes delivered?

A. I presume, total amount of grapes purchased by the previous owners, from certain parties which name is stated.

Q. The name of the seller of the grapes is stated on the name of each folder?

A. That's correct.

Q. And contained in each folder are weight slips for grapes delivered? A. Yes.

Q. To Mr. Particelli by those people.

A. I presume so, they were in the office when I came in.

Q. All right, they will speak for themselves, and also contracts? A. That's right.

Q. For the purchase of grapes? [168]

A. For the purchase of grapes. The same as are in effect at the present time.

Q. The same form of contract?

A. The same form of contract, yes, sir.

Q. Now, I hand you Respondent's Exhibit R for identification, which is a book approximately 18 inches long, and 12 inches wide, bearing the title, "Distilled Spirits Purchased," and underneath that form is B.E. 267-A. That book contained a lot of miscellaneous papers, and I will ask you to look through that, and ask you whether that book and the papers contained in it were also found by you

(Testimony of Phillip Branger.)

in the winery? A. Exactly.

Q. At the time you purchased it?

A. That's correct, sir.

Q. They were?

A. Yes. In fact, a letter or two that was addressed to me is also in that file. It was added after the papers were removed from the Lucca Winery.

Q. Oh, yes. This letter addressed to you obviously was not in the file when you took it over.

A. That is right.

Q. Will you check over through that file as rapidly as you can and see if that is the material that was in there when you took over?

A. These were the records that were in the winery when the property was turned over to me. These are the 702's. [169]

Q. 702's that were made out by Tiara Products Company?

A. That's right. Yes, I believe that is the entire amount of papers that were in when I took possession.

* * * * *

Q. (By Mr. Marcussen): Mr. Branger, what did you pay for the winery when you purchased it?

Mr. Brookes: I object, Your Honor, the witness has testified that the winery was purchased by him in December of 1945. That is two years after the transaction on which the issue in this case is based, and the distance of time between December of 1945, after the war was over, after the restrictions on the construction of wineries had been discontinued and

(Testimony of Phillip Branger.)

after the great demand for wine and wineries that was present during the war had terminated. The circumstances that I have outlined [170] lead, I submit, that the conclusion that the difference of time of two years is too great to make the purchase price of this winery in 1945, December of that year, of any probative evidence. Moreover, Your Honor, I can also properly object on the ground that the issue in this case must be not the value of the winery at any time, but the value of the wine, because we are not asking for a refund of any of the capital gains tax paid or the price received for the sale of the winery, and Counsel has, I think, by examination shown what is apparent, that the issue in this case is to the intent. He is trying to go behind the documents as to the value of the wine, but my principal objection is on the ground that the circumstances of the end of the war mean that two years' time can greatly change the value of any winery between December of 1943 and December of '45, so that whatever the value was, whatever the purchase price was in December of '45 is of no probative value in this case.

Mr. Marcussen: If Your Honor please, it is a part of the Government's case to show that there was no substance to the transaction, to the interpretation rather of this transaction which the Petitioner wishes to place upon it for tax purposes. As a part of the Government's case, I say the Government should be permitted to offer evidence as to the actual value, not only of the wine but of the winery,

(Testimony of Phillip Branger.)

to establish that there was an actual sham in the allegation which the [171] Petitioner has made on his behalf.

The Court: The value as of December, 1943?

Mr. Marcussen: Yes. Now, I realize that this purchase having been made two years later, may prima facie seem to be subject to attack but I would like to request that the evidence be received subject to a motion to strike if the foundation is not later laid for it. I propose to introduce in evidence, evidence covering conditions in the wine industry from 1943 to 1945 to show that there is no substantial difference which would reflect, to show rather, that the value of this winery in December, 1945, is a fairly accurate reflection of value in 1943.

Mr. Brookes: Your Honor, I submit that Counsel should lay his foundation first. The admission of any evidence into the record, even subject to a motion to strike, is bound to have some effect. It is written, it is printed, whatever it is is there, and a motion to strike something that is going to appear later, even in the recollection of a printed page, is virtually no protection against the consideration of even a psychological effect of irrelevant evidence.

Mr. Marcussen: I feel certain if it is not in this record, it can have no effect upon this Court, and the only reason I am calling Mr. Branger at this time out of order is his testimony is very brief.

* * * * * [172]

The Court: I will admit it. I think my present impression is that it's rather remote from the time.

(Testimony of Phillip Branger.)

I don't know just what effect it might have, and I don't want to decide that question at this time, but I do just inject that remark. I will admit it conditionally that the foundation will be laid for it.

* * * * *

The Witness: $22,000. [173]

Q. (By Mr. Marcussen): $22,000? A. Yes.

Q. Who did you purchase it from?

A. I have the name in my brief case.

Q. Whom did you talk to?

A. Pardon me, Lazzero from New York.

Q. It's your understanding that he was the owner? A. Yes.

Q. Did you talk to Mr. Lazzero at all?

A. No.

Q. Whom did you talk to?

A. The purchase was made there with Mr. Dumbra who had the mortgage on the property.

Q. What was his first name? Perhaps I could refresh your recollection, was it John or Victor?

A. I believe it was John Dumbra.

Q. And can you explain to the Court the circumstances, that is why it was Mr. Dumbra—what did Mr. Dumbra say to you in connection with the sale of the winery?

A. Should I relate all the details?

Q. Yes.

The Court: He wants to get some conversation that occurred at the time you negotiated.

A. I had sold some wine to the Dumbra interests, that is, to the Dumbra Winery. [174]

(Testimony of Phillip Branger.)

Q. Are you referring to Tiara Products Company?

A. Tiara Products Company, but it wasn't sold under the name of Tiara Products. It was sold to San Benito Winery in the southern part of the state. I should say, in Santa Clara County.

Q. Yes.

A. They were to bottle the merchandise and in turn buy it after it had been bottled.

Q. Don't go into all those details about that transaction, Mr. Branger. You did sell Tiara Products Company some wine? A. That's right.

Q. And did they owe you some money on it?

A. Correct.

Q. How much did they owe you at the time that you had negotiations with Mr. Dumbra for the purchase of the winery?

A. They owed me about $17,000 at the time, and in return they offered to give me the mortgage on the Lucca Winery, and I looked the property over, and I felt that it was—well, safe to—it was safer to get their mortgage than to wait longer for my money. So I took the mortgage and paid the Dumbra Interests a balance of 5 or 6 thousand dollars, I don't recall the exact amount, to make the purchase price of $22,000.

Q. Of $22,000? A. That's right. [175]

Q. And what was the—did you receive a credit of $1,000 on the $22,000 purchase?

A. Yes, it was agreed that if I didn't buy it and would sell it probably to someone else, they would

(Testimony of Phillip Branger.)

use that cash to pay what they owed and it would give me a commission of $1,000. Since that agreement had been made, I felt even if I bought the property for my own use, that I was entitled to that commission which they agreed to.

Q. So they gave you a credit for that?

A. They gave a credit of $1,000.

Q. But the actual purchase price agreed upon and on the basis of which the transaction was handled was $22,000? A. That's right.

Q. Now, would you describe the property as it was when you purchased it?

A. Oh, it's the average winery with a storage capacity of about 200 or 300,000 gallons, and fermenting room of about 65,000 gallons. The two buildings are adjoining one another. They are on a piece of land about an acre and a third next to the railroad track, with a well and a scale that you find in the average winery of that size. It's near Forestville, in fact, it's on main street of Forestville. The property didn't seem to have been in use for a short time, and it needed care. The roof was in bad shape, incidentally. I spent a few thousand dollars repairing it, adding some cooling systems and another [176] crusher. I had plans to make that property pay for itself, that is, pay for the taxes and insurance, but once conditions got to a point where it was not profitable.

Q. The main building, will you describe the construction of the main building?

A. You speak of the storage building?

(Testimony of Phillip Branger.)

Q. Yes.

A. It's a Basalt Block building with a tin roof, concrete floors, about 80 by 100 feet. I am speaking from memory now, I don't recall if my figures are accurate, but I believe it's 80 by 100, that is, the storage building.

Q. Yes. What about the other building?

A. And the building is a frame building, concrete floors, with an asphalt roof, that is about all, and the size, about the same, about 80 by 100.

Mr. Marcussen: That is all.

Cross Examination

Q. (By Mr. Brookes): Mr. Branger, how long had the winery been as you described it, in disuse, before you purchased it?

A. It was still on the bond but not in actual use, that is, there was no wine stored at the time I took possession, if that is what you mean.

Q. Yes, how long had the tanks been dry?

A. That I really don't know exactly. [177]

Q. What was the condition of the cooperage when you acquired the winery?

A. In fairly good shape.

Q. Had there been any deterioration of the cooperage from the barrels being dry?

A. Very little to speak of.

Q. Had there been any?

A. Well, I can't say, because I didn't make any wine in that winery until 1947, and at that time we didn't have to repair any of it except ordinary

(Testimony of Phillip Branger.)

work that you do in a fermenting room such as wetting the cooperage and letting it swell up to its standard size, cleaning, of course, and so on.

Q. You testified, Mr. Branger, that you, as I heard it, that Tiara Products owed you $17,000 and they offered you the mortgage of that amount which they held on the winery, and that you said it was safer, as I think you expressed it, to take the mortgage on the winery than to wait for your money? A. That's right.

Q. How long had Tiara owed you the money?

A. For several months.

Q. Were they behind in their payments?

A. That's right.

Q. Did you expect that you weren't going to get paid until you took this?

A. I was afraid so, yes, sir. [178]

Mr. Brookes: Thank you, that is all.

Redirect Examination

Q. (By Mr. Marcussen): You had to pay an addition amount of cash to get the winery?

A. Yes.

Q. To make up the difference?

A. Yes, sir.

Q. Between the mortgage and taking all facts into account what they owed you, what was the amount of the mortgage?

A. The mortgage itself on the property I was told was $20,000, that was the mortgage held by

(Testimony of Phillip Branger.)

Dumbra on the property, but I have no paper or proof to that effect.

Q. Well, didn't they convey the mortgage to you?

A. No, I had a straight deed, you know, clear title to the property.

Q. Was there a foreclosure on the mortgage, do you know? A. I don't believe so.

Q. But at any time you received clear title to it? A. I received clear title.

Q. Of the property, free of a mortgage?

A. Yes, sir.

The Court: Who held the mortgage, who owed the mortgage?

The Witness: Dumbra. [179]

The Court: I believe it was John Dumbra. You didn't assume the mortgage, you just took it free of the mortgage?

The Witness: Yes, I took it free of the mortgage, yes, your Honor.

The Court: In other words, you got $17,000 value in the property as you considered it?

The Witness: That's right.

The Court: As represented by the mortgage?

The Witness: As represented by the mortgage.

Q. (By Mr. Marcussen): Plus the additional amount of cash that you had to pay and credits that you had to cancel?

A. I had to pay a little over $5,000 to make up the balance for the purchase price; we had agreed to have the property turned over to me for $22,000,

(Testimony of Phillip Branger.)

and since they owed me only about $17,000, I had to give the amount to the title company in order to get clear title.

Mr. Marcussen: Thank you very much, Mr. Branger. That is all.

The Court: That is all, Mr. Branger.

(Witness excused.)

Mr. Brookes: Your Honor, I wish to call Mrs. Arthur Guerrazzi.

Whereupon

MRS. ARTHUR GUERRAZZI

was called as a witness on behalf of the Petitioner and having [180] been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Clotilde Guerrazzi, 1350 Francisco Street, San Francisco, California.

Q. (By Mr. Brookes): Mrs. Guerrazzi, will you state what your maiden name was?

A. Clotilde Particelli.

Q. Are you any relation to Giulio Particelli?

A. Yes, I am his daughter.

Q. Were you employed by Mr. Particelli at any time?

A. Yes, I was. I worked for my father.

Q. In what years?

A. Well, I worked for him way back from the first year we made wine right after the prohibition,

(Testimony of Mrs. Arthur Guerrazzi.)

right after the law was repealed.

Q. Through what years?

A. Through—the winery was sold.

Q. Then you were working for him at the winery in 1943? A. I was.

Q. And throughout 1943? A. I was.

Q. What were your duties?

A. At the winery in '43 or before? [181]

Q. Please tell us what your duties were for 1943 and the several years preceding that.

A. In 1943—well, during crushing season I took care of the weighing the trucks and so forth and so on and the book work connected with the winery. Also I took care of the other, we had a small business in connection with the wholesale of the wine. And the bottling plant and so forth.

Q. What were your duties in connection with the store and the bottling of the wine?

A. I managed the store and the bottling plant, did most of the work connected with it inside there.

Q. Do you mean that you did the bottling?

A. I did.

Q. Did you state that you kept the books?

A. I did.

Q. Does that mean that you kept the books only at the store, or did you keep the winery books too?

A. All the books.

Q. Does that mean that you did the billing?

A. I did.

Q. And did anyone else make any entries in the books besides yourself? A. No.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. Do you remember the prices which were charged for the various types of wine sold by the business in 1943? [182]

A. Well, I do remember our wine, what I mean by our wine, we had our wine as the leading wine and that was the cheapest grade of wine we had.

Q. What were the prices of your wine?

A. Our wine we sold it all the way from 32 to 38, maybe a few gallons at 40 cents, according to the quantity they bought.

Q. Were these prices per gallon?

A. Right.

Q. Do they include the tax? A. They do.

Mr. Marcussen: Is that at the store?

The Witness: This is wholesale.

Q. (By Mr. Brookes): This is wholesale?

A. Yes.

Q. And in what quantities?

A. 5 gallons, demijohns, 10 gallon barrels, 25 gallon barrels, and 50 gallons.

Q. You said there was a range of prices according to the quantity. Could you identify the price when it was sold—the wine was sold in 5 gallon demijohns?

A. Yes, I would say that would be the highest price, say 38 or 40 cents, and then say they bought maybe a 50 gallon barrel, I would say the price was 33, maybe 35. [183]

Q. And also including the tax?

A. Correct, that was all tax paid wine.

Q. Do you remember the quantities of wine of

(Testimony of Mrs. Arthur Guerrazzi.)

your father's old vintage which were sold in this way?

A. No, right offhand I can't remember the quantity that was sold that way. I would say most of it was sold all—with the exception of those few carloads that we sent back East.

Q. Did you mean most of it was sold in this way except for the carloads? A. Yes.

Q. Would you have any approximate recollection of how many thousands of gallons?

A. No, that I can't. The only thing I can say is that like that '43 crush, whatever the wine, less the one that was sold to John Dumbra, less the carloads, that was what actually we sold that way.

Q. How was the 1942 crush sold?

A. '42 crush was sold that way too. That was sold in barrels, demijohns and so forth.

Q. Would you describe such sales as frequent or infrequent?

A. No, frequent, because that is the only way we had of disposing of our wine in '42—'41. In '42 we sent those carloads—'43 we sent those carloads back East. '42 we sent it [184] that way, sold it that way, in those 5, 10, and 25 and 50 gallons.

Q. And prior to the sale of these carload lots that you mentioned, prior to that time, during 1943—— A. Yes.

Q. ——were there sales of your own wine in these 5, 10 and 15 and so on?

A. Yes, there were.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. Would you describe them as numerous or infrequent?

A. Well, no. I would say they were numerous because we had some wine, we made quite a bit of wine in 1942, I think.

Q. Do you recall approximately or exactly, if you recall, the date of the sales of the carload lots to which you refer?

A. No, I don't exactly remember the dates. I wouldn't want to be quoted on that. I imagine it was some time after—oh, I don't know. It wasn't new wine that we sent back there, that I am sure of. It must have been the middle part of the year before crushing season.

Mr. Marcussen: What year?

The Witness: That was '43, if I am not mistaken it was '43.

Q. (By Mr. Brookes): That is your recollection?

A. That is my recollection. [185]

Q. Do you recall the name of the purchaser of the tank lots?

A. I don't remember his name but I think his brand name or company name was Sunset or Sunsweet, something like that.

Q. And located where?

A. Well, I can't remember that, back East somewhere, Ohio, Cleveland, Ohio, or somewhere back East. No, I couldn't tell you exactly. I made the shipping tags and all, but I don't remember.

Q. It was out of the state?

A. It was out of the state.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. Mrs. Guerrazzi, do you know anything of the circumstances of the sale of the wine and winery to Tiara Products? A. Yes.

Q. Tell us in your own words what you know of the circumstances of the sale.

A. Well, what do you mean by that?

Q. Describe, please, the events as you know them.

A. Do you mean our introduction?

Q. The negotiations of the sale.

A. Our introduction to Mr. Dumbra and so forth?

Q. Including your introduction to the purchaser, Mr. Dumbra, and any events as you know of them of the negotiations between Mr. Dumbra and your father.

A. Well, the way I recall the situation was my father [186] went in the town at the time. My husband and I were—Mr. Dumbra came out and he asked me, he said that he would like to buy some wine. Well, I says I didn't have no authority whatsoever to quote him anything. He wanted to know how much wine we had on hand. I said I couldn't do that because I had no authority to do it but that my father was up in the southern part of the state and when he returned, I would tell him about him, so he took our 'phone number and he asked me if I knew more or less when he would return. No, I don't remember if he called up too in the meantime and I told him I was expecting him a certain night, that he was expected back,

(Testimony of Mrs. Arthur Guerrazzi.)

so this night, I guess it was the night after or the same night, I don't recall that, anyway, we were having dinner and my father had just returned from the southern part of California. I believe it was Fresno at the time and I had no sooner got to tell him a few facts of my conversation with John Dumbra than Mr. Dumbra did 'phone him and ask him if he would like to sell the wine, and Dad said, "Well, I can sell the wine, sure I can, why not?"

Mr. Marcussen: Were you present at this conversation?

The Witness: I was in the home when he was talking to Mr. Dumbra on the 'phone. I was in the house.

Mr. Marcussen: You heard your father say this?

The Witness: I knew he had the conversation with him on the 'phone because I was right——

The Court: Did you hear it? [187]

The Witness: Yes, I did. The kitchen was right off the hall and in the hall was the 'phone, so I would have heard it if I was in the house. So he asked my Dad to go down there to see him that night at the hotel, so they had a little discussion over that.

Mr. Marcussen: You didn't hear that, now, Mrs. Guerrazzi?

The Witness: Yes, I did, because I was in the house.

(Testimony of Mrs. Arthur Guerrazzi.)

Mr. Marcussen: You didn't hear him ask it on —over the telephone?

The Witness: No, I couldn't. All I could hear was the response.

Mr. Brookes: Your Honor, the witness is talking about something which, if it didn't come out this way, I would bring out by direct questioning. It will have the appearance of being hearsay, but it is not, and I want to present to you what I propose to establish by the questions, if they have to be asked, and the purpose behind it and the reason for its admission. Mr. Marcussen stated that he was attempting to impeach the testimony of Mr. Particelli yesterday. I am attempting to show that Mr. Particelli is telling the same story now that that he told to his daughter in 1943. If I succeed in doing that, I will be showing within well established boundaries of what is appropriate and permissible, that the witness has been [188] consistent both today, or yesterday, and in December of 1943, and it would be of obvious value to my case, and, furthermore, it is admissible under the established principles, I think your Honor will agree.

The Court: I think that the response by Mr. Particelli would indicate probably what he was responding to. The hearing—the thing is apparently whether she heard what Mr. Dumbra said over the 'phone. It is very probably that she didn't hear that, in fact, I think she claimed she didn't hear what was said, but the answers would indicate

(Testimony of Mrs. Arthur Guerrazzi.)

the nature of the conversation at the other end of the line.

Mr. Brookes: That is so, your Honor, but when it comes to the conversation which I think she was just leading up to or just mentioned, at the hotel, I think she will probably testify that she was not present at the hotel conversation.

The Court: We haven't reached that point yet.

Mr. Brookes: Well, if we haven't, we soon will. I will then wait until we do, and then make my point.

Q. (By Mr. Brookes): Proceed, please. You were relating the hotel conversation as you heard it at your father's end of the line?

A. They had planned the meeting with one another at the Santa Rosa Hotel. My father went to meet John Dumbra at the hotel. The next morning my father told us that he wanted to buy the wine and he told him he was going to buy it all and so [189] he was going to come up to the winery to taste the wine. Dad felt that he almost had to sell the wine. He had quite a bit of mortgage at the bank, at the time he also wasn't feeling well. I remember that part of it, so the next thing I know, that morning they both went to the winery, John Dumbra and my father, and he tasted the wine, and he says it was very satisfactory to buy the wine. He asked Dad what the price was, and Dad says, "Well, he would have to come down to the city to see. He was selling it for the ceiling price."

(Testimony of Mrs. Arthur Guerrazzi.)

The reason he was selling it was to pay the bank. He was quite worried about all those thousands of dollars he owed the bank.

Mr. Marcussen: Did he call Mr. Dumbra on the telephone?

The Witness: That wasn't on the 'phone. This was the next morning at the winery when John Dumbra came up to see the analysis of the wine.

Q. (By Mr. Brookes): Were you there at that time? A. No, I was not.

Mr. Marcussen: Your Honor, the Respondent objects to that.

The Court: Yes, I think the objection has to be sustained to that. You are supposed to testify to what you heard.

Mr. Brookes: Your Honor, may I make this point again? [190] This is a very serious matter in the case of the Petitioner, and I am quite certain I am correct. I shall ask for an exception, of course. Please don't think I am trying to run the Court.

The Court: I understand she is purporting to relate the conversation between Mr. Particelli and Dumbra at the winery the next morning.

Mr. Brookes: May I stop the witness and ask a question which would be a better foundation for the point I am about to make?

The Court: All right.

Mr. Marcussen: I would like to, before you do that, I would like to include in my objection a

(Testimony of Mrs. Arthur Guerrazzi.)

motion to strike the testimony so far as it pertains to the conversation.

The Court: It may be stricken at this point as to what occurred in the conversation, at the winery that morning, between Mr. Particelli and Mr. Dumbra. I understand you didn't hear that?

The Witness: No, I wasn't there.

The Court: That may be stricken.

Mr. Brookes: May I proceed?

The Court: You may proceed.

Q. (By Mr. Brookes): To lay the foundation, Mrs. Particelli, when your father returned from his meeting with John Dumbra at the hotel [191] in Santa Rosa, did he tell you anything about what happened at that meeting?

A. Mr. Brookes, you called me Mrs. Particelli.

Q. Excuse me, I am sorry. I may do that again, and, if so, I would—I will apologize.

A. I just thought——

Q. When your father returned from his meeting with Mr. John Dumbra at the hotel in Santa Rosa, did he tell you anything about what happened? A. Yes, the next morning.

Mr. Marcussen: I object to that, if your Honor please; it constitutes hearsay.

The Court: Overruled.

Q. (By Mr. Brookes): When did he tell you?

A. The next morning.

Q. Do you mean the morning after his conversation?

A. After his conversation with Mr. Dumbra.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. Do you remember now what he told you then?

A. Yes.

Q. Will you relate what he told you at that time?

A. He told me that he had intentions of selling the wine, as I said before, he was quite worried about the large sum of money that he owed the Bank of Sonoma County, and when he crushed —we all thought in the wine industry that the OPA would [192] raise that price according to the price we paid for the grapes, but this was already December and it didn't look like there would be any relief for that, so he decided in his own mind that he would be better off selling the wine and paying the bank off.

Q. Did he tell you this at this time?

A. Yes, he did.

Q. Did he tell you whether or not he had agreed to sell anything?

A. Well, he said that he had almost agreed to sell the winery, the only thing was that he had to be accurate on what the ceiling price was of the wine.

Q. You stated, Mrs. Guerrazzi, that he had used the—you used the word winery twice. You first said that he had almost agreed to sell the winery, and then he——

A. Never mentioned the winery that morning before he saw Mr. Dumbra. He just mentioned wine to me. That is what Mr. Dumbra really came out to see Mr. Particelli for, was for the wine.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. And did you mean to state that your father stated to you then that he had—that it was the wine that he had agreed to sell at the wine celling price?

A. They didn't discuss the winery at all, I don't believe. It was just the wine.

The Court: You just misused the word? [193]

The Witness: That is all I did, Judge. I meant wine.

Q. (By Mr. Brookes): Do you remember when your father and Mr. Dumbra met a second time?

A. You mean after the meeting that evening?

Q. After the Santa Rosa Hotel meeting.

A. Yes.

Q. Where?

A. At the winery the next morning after the conversation of the night before.

Q. Were you present?

A. No, I was not.

Q. Did your father tell you immediately or shortly after that second meeting with Mr. Dumbra what had transpired at that meeting?

A. Yes, naturally. It was only natural that he would tell me those things, being that I worked for him.

The Court: Did he tell you?

The Witness: Yes.

Q. (By Mr. Brookes): What did he tell you?

A. He told me he had agreed to sell him the wine for the ceiling price and that he was coming

(Testimony of Mrs. Arthur Guerrazzi.)

down to see what the actual ceiling price was on the wine. [194]

Q. Did he mention anything about the conversation relating to the winery?

A. Yes, he casually said that Mr. Dumbra asked if he would also like to sell the winery and Mr. Particelli says, "Well, I don't know if you want to pay the price for it." That is as far as that conversation went, I believe.

Q. Did your father say whether he had quoted a price?

A. I don't believe—I don't know if he did or not. He may have said, but like I say—that he says "you want to pay the price" so if he did—he may have quoted him, you know, a big sum for the winery. Now, that I can't recall, but I know that is as far as the conversation went.

Mr. Brookes: Thank you.

The Court: You mean that is what he told you?

The Witness: That's right, your Honor. That he had asked if he would like to sell the winery.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Marcussen): You weren't present at any conference between your father and Mr. Dumbra? A. I was not.

Q. Were you here in the courtroom yesterday morning? A. I was.

Q. And did you hear your father testify concerning his [195] conversation with Mr. Dumbra?

(Testimony of Mrs. Arthur Guerrazzi.)

A. I did.

Q. About this entire matter of the Tiara matter?

A. Well, I was in the courtroom yesterday morning and I heard everything that went on.

Q. But you heard everything that he testified to yesterday morning, concerning the sale and the negotiations for the sale with Mr. Dumbra?

A. I must have; I was in the courtroom.

Q. Well, there isn't any doubt about it in your mind, is there?

A. No, I was listening to all the proceedings.

Q. Yes. Do you know Arthur Andersen & Company and what they do? A. Yes, I do.

Q. What is their business?

A. They are accountants.

Q. When did they first do any work for your father?

A. They did work for my father in the year '43 before the sale of the winery.

Q. Before the sale of the winery?

A. Yes.

Q. Did they do any work in prior years for your father?

A. I believe not. They were recommended to my father from the Bank of Sonoma County. [196]

Q. When would you place the date of the first contact your father made with them?

A. I don't remember. I wouldn't want to quote a date because I don't remember it.

Q. Well, can you approximate it at all?

A. No, I can't.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. You said a moment ago you knew it was before this——

A. It was before, because we had contacted them in order to fill our income tax reports for the year '43. That was before we had intentions of selling the wine and winery.

Q. I see.

A. I don't remember the month.

Q. Were your income tax returns filed on the calendar year basis, that is, for the calendar year?

A. I believe so, I don't know if I understand that question.

Q. What income tax return was it, the return for the—— A. For 1943.

Q. For 1943, and you say that your father consulted Arthur Andersen & Company with respect to his tax liability for that year and that that consultation took place prior to December of 1943?

A. Oh, yes, we knew of Arthur Andersen & Company prior to the sale of the winery.

Q. Do you know what the nature of the inquiry was [197] concerning the 1943 income tax at that time? A. You mean prior to the winery?

Q. Yes.

A. It wasn't an inquiry. It was just for them to come up and do the work for us, to take all the figures down and fill our income tax form. It wasn't an inquiry, it was for them to do the work for us.

Q. Did you keep the statistics and books from which the income tax returns were prepared?

A. Yes, I kept all the bills of merchandise

(Testimony of Mrs. Arthur Guerrazzi.)

bought, and I had all the checks from the labor paid out and so forth.

Q. Had you done that entire year's?

A. Yes, I had.

Q. Well, let's take—did you do it for the years 1941 and 1943, for example? A. Yes.

Q. For the 1942 return, did you submit that information to Arthur Andersen & Company?

A. Mr. Andersen didn't do our reports in '42.

Q. Who did them?

A. Now, I don't recall if I did them all completely. There was another man in Santa Rosa by the name of Walter F. Price. He is now passed away. He was an elderly man and he at one time helped us with those reports.

Q. You said that you kept the books for the store and [198] the winery? A. I did.

Q. Now, did you—what form did you keep them in?

A. Well, I really kept all the bills, all the cancelled checks, and all the deposits made.

Q. Did you keep any accounts in a book, a book of accounts?

A. Yes, I probably had a list of the wages paid.

Q. What other accounts were kept?

A. I had all the sales tax from all the merchandise sold.

Q. The merchandise sold? A. Yes.

Q. What other accounts did you—do you recall?

A. We had the bills to show what merchandise we purchased. We had the bank deposits to show

(Testimony of Mrs. Arthur Guerrazzi.)

how much money we deposited. All the money was deposited through the bank.

Q. Did you have anything in there about the insurance account?

A. You mean payment of insurance policies?

Q. Yes.

A. Well, no doubt that was on there too. That was bills paid.

Q. In that book did you attempt to keep all the expenses of the year as they occurred?

A. Well, I believe so, if I didn't have actually everything [199] on the books, I had all the bills.

Q. Well, now, let's take the gas bill. Did you have the gas bill in there?

A. I believe all the gas bills were there, yes.

Q. Then you not only saved the gas bills, but did you total them up and enter them into a book?

A. Now, I wouldn't be sure in telling you if I totaled them up and entered them in the book. What I am positive of is that I kept all of these separate, like the P. G. & E., I would have in some file, some other company in another file, some other in another file. If I actually had those on a book, I can't say, but I had the bills, and that is how that income tax was tabulated, through the bills.

Q. Tell me more about this book of accounts that you kept.

A. Well, I don't—the book of accounts, I know I had some figures entered on books of accounts like wages, that was almost the only way I could keep track of that unless I went back and got all

(Testimony of Mrs. Arthur Guerrazzi.)

the cancelled checks, like the wine we purchased, I had the bills. I didn't have no book of accounts, I had the bills for those.

Q. The wine you purchased?

A. Yes, actual bills I had, and P. G. & E.

Q. And did you enter that in the books?

A. I had bills of those, yes. [200]

Q. But did you also enter them in the books?

A. I believe no. I think I tabulated all those from the actual bills at the end of the year.

Q. At the end of the year you added them up and when you added them up, did you enter certain of them in the book of accounts?

A. That I can't tell you.

Q. What did you try to do with respect to that book, will you describe what the significance of that book was? You put some things in, you say?

A. Wages, I believe I put the wages in. I tell you like the income tax papers was tabulated from all the bills that was kept in files and at the end of the year we went through all those files and tabulated all those bills.

Q. Now, what did that book look like?

A. To tell the truth, it may have been two or three books. It could have been one book with wages, because, like I said a little while ago, those other bills were tabulated from the files of the bills we paid.

Q. Are you sure there was more than one book of accounts for the year 1943?

A. Well, I can't tell you for sure. That is seven

(Testimony of Mrs. Arthur Guerrazzi.)

years back, my memory isn't that good.

Q. But you do have a very clear recollection of your father's telephone conversation and what he told you about the [201] winery?

A. Yes, I do. There are certain facts I remember quite clearly.

Q. And that was a subject matter which wasn't your business, you didn't particularly have authority to discuss that with Mr. Dumbra when you told——

A. No, but it was my interest, his selling the winery too and the wine. I was part of that, I had worked all these years for him. It was my business, I thought.

Q. Now, did you purchase alcohol stamps, I mean the alcohol tax stamps, for alcohol tax requirements? A. I did.

Q. When did you get those?

A. From time to time.

Q. As you needed them? A. Correct.

Q. How large would the amount be that you would buy?

A. I wouldn't say offhand. I would say all the way from $50, $100, $200, as we needed them we bought them.

Q. Did you have any on hand at the end of the year? A. I believe we did.

Q. How many?

A. That I couldn't tell. That I don't recall, the number of stamps and the value.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. Well, what approximately, what would you say? [202]

A. I wouldn't give an approximate answer.

Mr. Brookes: I object. Even the widest scope of cross examination requires that the questions be relevant to the issue of the case, and this isn't an alcohol tax case.

The Court: I will overrule the objection.

Mr. Marcussen: Thank you, your Honor.

Q. (By Mr. Marcussen): I want your best recollection of the amount of stamps that you had on hand at the end of 1943, after the winery had been sold.

A. I wouldn't commit myself to that, to answer that, because I can't remember. I will tell you this, when the winery was transferred to Tiara Products Company, whatever stamps we had on hand had to be turned back to the Alcohol Tax Unit. Now, the amount I can't tell you if it was 5, 10, 50 or $100, because I do not recall.

Q. It wouldn't be $1,000.

A. It could be for all I know. I can't remember. We never kept that much on hand, I will say that much. We never bought that much unless we had a ready sale for it.

Q. And from time to time did you ever take the stamps back during the year, did you take them back? A. To the Alcohol Tax Unit?

Q. To the place where you had purchased them.

A. That is not permissible. It isn't permissible. Not [203] as far as I know. Once you buy those

(Testimony of Mrs. Arthur Guerrazzi.)

stamps, that is Government property, you know, stamps. There is more to those stamps than just buying a postage stamp. As for the postage stamps, you can buy them and do anything you want to do with them, but the alcohol stamps, you have to account for those.

Q. Exactly.

A. If you use $50 a month, you file that report in that form 702 that you use these $50 worth for so many gallons of wine and that has to be tabulated.

Q. And if you had any stamps left?

A. You would account.

Q. And you would account to the Alcohol Tax Unit for those too?

A. Yes, you would have balance on hand at the end of the month, so many stamps, balance on hand at the end of the month. So many stamps purchased and so many used and balance on hand at the end of the month.

Q. And then when you were going out of business and you don't need any more——

A. The usual procedure is to turn them back to the Government with a letter.

Q. What would you do?

A. With a letter stating the denominations you had. Say if you had ten, they in turn are to refund you that money. As far as I know, we have never received a refund. [204]

Q. You have never received a refund?

A. No, as far as I know.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. And if you did return any, you would have got a refund, wouldn't you?

A. No, I wouldn't exactly say that. Mr. Hall in Healdsburg, he is the Hall Insurance Company, at the time I gave him these stamps and we filed our final report, he said that procedure takes quite a long time to get through. As far as I know, we never did receive the money for those stamps. I know there was some stamps turned in but I don't know how many.

Q. Now, if you did surrender any after the sale of the business, if you did, rather, have any on hand, you surrendered them to the Alcohol Tax Unit? A. Yes.

Q. What did you do with these books of account or this book of account that I have been inquiring about? A. You mean from that '43?

Q. Yes, in the year 1943, after the winery was sold or at any other time during 1943, what did you do with those books of account and where did you keep them?

A. We kept them at the office in Forestville.

Q. I think you had a safe there, didn't you?

A. We have a safe but hardly the safe that would keep these books, hardly large enough. The safe was for more—papers like insurance policies. [205]

Q. How high was the safe?

A. Well, I would say about as high as this (indicating), from where I am, not from the bottom of the floor.

(Testimony of Mrs. Arthur Guerrazzi.)

The Court: Estimate in feet, if you can.

The Witness: I don't know if I can estimate it in feet. Would it be about a foot?

Q. (By Mr. Marcussen): A height of the kind I am talking about?

A. The height I would say would be about two feet.

Q. How would you say it compares with this? (Indicating.)

A. Yes, I would say it would compare with that.

Q. As high as this table here?

A. Yes, two feet.

Mr. Marcussen: Will you stipulate that is about 30 inches?

Mr. Brookes: Yes, I will stipulate to that.

The Witness: I am not very good at feet.

Q. (By Mr. Marcussen): How wide was it?

A. I would say about there (indicating) more or less.

Q. About here? A. Maybe a little shorter.

Q. All right.

Mr. Brookes: That looks like about 26 inches.

Mr. Marcussen: 26? All right. I will stipulate to [206] that.

Q. (By Mr. Marcussen): You kept the books there?

A. I didn't keep all the books in there.

Q. Did you keep the books I am talking about in the safe?

A. I don't think so, I know in the safe we kept the bank notes that he owed the bank, policies and

(Testimony of Mrs. Arthur Guerrazzi.)

the stamps were left in the safe.

Q. And in that size of a safe, that is all you kept in there, in that safe?

A. It wasn't a very big safe, the space in the safe was about that much space after you take all the outside structure. There was a space in there with three little drawers, and like this and like that (indicating). That is as big as the safe was.

Q. Where is that safe now?

A. I have it.

Q. You have it? A. Yes, sir.

Q. It's in your home?

A. It's in my basement. You may see the safe at any time you want to.

Mr. Marcussen: Counsel, will you stipulate that the exact measurements of that safe may be obtained and submitted [207] in evidence in this case?

Mr. Brookes: I will stipulate subject to the objections to its relevancy which I am about to make. Your Honor, I have been overruled and I don't wish to be contumacious in seeming to press the objection, but Counsel has not informed the Court of what relevance that has. He has assured the Court that it is relevant, but I don't believe the taxpayers, when they come into Tax Court, as witnesses should be subjected to an examination about everything under the sun. I have no fear of what this witness is going to answer but I object to the principle of having examinations that are irrelevant, that might go into anything merely on

(Testimony of Mrs. Arthur Guerrazzi.)

Counsel's assurance that he thinks they are relevant.

The Court: I don't think the exact measurement of the safe is of sufficient importance. Was this a Hall safe?

The Witness: It was a regular office safe.

The Court: Thick walls?

The Witness: Very thick walls.

The Court: Supposed to be a fireproof safe, an old-time safe?

The Witness: I have it in the basement at home.

The Court: We can't see it there. The safe inside was, of course, considerably smaller than the outside measurements?

The Witness: Very small. [208]

The Court: You gave an estimate there about what the inside measurements were about by measuring with your hands. We don't have anything in the record to indicate the feet.

Mr. Marcussen: I have a question to ask about that. I saw the witness put up her hands for the thickness of the wall or the safe. Would you put them up again?

The Witness: I would say the walls were this thick in one of those old-fashioned safes all the way around the four sides (indicating). I would say they were all that thick. Now, I may be off a few inches on and off.

Q. (By Mr. Marcussen): Would you say six inches?

A. Yes, I would say about six inches from what I recall. I know the safe isn't too large in there.

(Testimony of Mrs. Arthur Guerrazzi.)

The safe is very old, must be very old.

Q. What did you do with the books during the year 1943?

A. As I told you, I didn't have a regular book. I kept those bills in the file. I had a file and I kept all these bills and that is how the income tax was tabulated. What was entered on the books was any books pertaining to the winery, how much wine we had on hand, how much was sold and all those records that we were really supposed to keep accurate for the Government that from time to time they came to inspect and those books were not even kept in the safe because there was no room in the safe for those books. [209]

Q. Which book are you referring to?

A. I mean the form for the Government.

Q. The 702?

A. Yes, they were not kept in the safe.

Q. I am not talking about the 702——

A. Yes, they were.

Q. I am simply talking about the books which you—in which you entered wages and other special accounts that you have referred to.

A. It was kept in the office, I wouldn't say in the safe; no, it was kept in the office.

Q. Did you give that to Andersen & Company for the preparation of the income tax return for 1943?

A. I believe Arthur Andersen—one of the representatives came up to the office to tabulate that up there and at that time I gave him every book I had

(Testimony of Mrs. Arthur Guerrazzi.)

on hand and they took their figures from those.

Q. Do you know Mr. Gould, who is sitting beside me here? A. No, I do not.

Q Did you ever see him before?

A. I believe I saw him once, if my memory is good. I didn't recognize him yesterday in the courtroom, but, if he is Mr. Gould, I must have seen him once. If I remember correct, I was in one of Arthur Andersen's accountants office one day and I came down with some books for him to help me prepare and I [210] believe Mr. Gould was there. Now, I don't know if I am right or not.

Q. Did you show him that book at that time?

A. Didn't show him any books, what books I had at that time were other books after '43.

Q. After 1943? A. Yes.

Q. Did you show him the books for 1943, this book I have been talking about?

A. I didn't show Mr. Gould nothing; I saw Mr. Gould for about ten minutes that day. That is the only time I saw Mr. Gould, and the only reason I knew it was him was because the accountant told me it was. I had never seen the man.

Q. Did you give the books to Arthur Andersen & Company?

Mr. Brookes: If Your Honor please, I object to any continuation of this line of questioning, and I am going to move to strike the examination which has preceeded it relating to this. I have been waiting for its relevance to appear. My objection to it is that it is a line—it is related to facts which have no

(Testimony of Mrs. Arthur Guerrazzi.)

relevance to the issue in this case. This is not a fraud case, there is not any issue here, any question of whether or not the records of this taxpayer in general were correct. The stipulation has been entered as to the cost of the grapes, that was, and an adjustment in the deficiency letter, and as to the adjusted basis of the winery, that was an issue in [211] the case, as to the allowance of the salaries, that was in issue in the case, and the only remaining issue is the question of whether the wine was sold for $77,000 or whether it was sold for some other price, and this fishing expedition that Counsel is going on might go on forever, and it may end, I don't know where, and I see no relevance to the issue.

The Court: What is the relevancy?

Mr. Marcussen: The testimony that has been offered here, that these books were destroyed, the books of record. The relevancy of this is, I think the evidence will show, that the income tax returns were prepared from that.

Mr. Brookes: Of what relevance is it to prove that?

Mr. Marcussen: There are other matters than that. It shouldn't be required to——

Mr. Brookes: May I point out that the income tax returns must have been prepared in February, March or April of 1943, and that the testimony of Mr. Particelli establishes the date of the destruction of the records by the accidental fire as being several months, at least, after that. Mr. Particelli

(Testimony of Mrs. Arthur Guerrazzi.)

has testified that he and his family continued to live in their establishment where the vineyard was at Forestville for approximately a year after the sale of the winery, and he further testified that was the location of the records until he sold that property; that he then moved down to what I think he calls Rincon Valley, to Santa Rosa, and the records were transferred [212] there and placed in the barn, and it was there that the fire occurred, and that the date of that was over a year after December, 1943, and the preparation of the income tax returns then must have been made—done at least nine months before that, so the existence of the records at the time of the preparation of the income tax returns must be obvious, and it proves nothing to establish their existence at that time.

The Court: What is it you want to find out from this witness by those books?

Mr. Marcussen: If Your Honor please, I want to find out what happened to those books, what was in them, that book, and what accounts were in it, and I want to get her testimony on it. Now, this witness has testified to many things involving things that she heard. I also want to impeach this witness and in addition the information is specifically needed for the purpose of analyzing the 1943 income tax return which is exceedingly vital to the issue in this case.

The Court: You have asked numerous questions of what went into the books.

Mr. Marcussen: I should also like to find out

(Testimony of Mrs. Arthur Guerrazzi.)

what she did with them, if she——

The Court: I will overrule the objection to that extent, at least, at this time.

Q. (By Mr. Marcussen): Did you take the books I have been talking about [213] containing entries that you made pertaining to expenses and income for the year 1943 to Arthur Andersen & Company?

A. No, Arthur Andersen & Company saw it in Forestville.

Q. But you never took it to him at any time?

A. No, sir, and if I—when I did see Mr. Gould, if he is the man I saw in Arthur Andersen's office, it wasn't in '43. It was about four years ago, if he is the man I saw. I went down to Arthur Andersen & Company for other purposes to show them the books because they have been keeping the books ever since, to show how I was getting along with the books, because they helped me make the entries from time to time, to show how to do it, and that was four years ago.

Q. And so far as you know, that book was never given by you, at any rate, to Arthur Andersen at any time, is that correct?

A. No, as far as I know, because Arthur Andersen made that, the books, he tabulated that income tax up in Forestville.

The Court: Did he see the books at that time?

The Witness: Arthur Andersen saw all the records we had up there, the bills and books if there was any books, the bills, the bank deposits.

(Testimony of Mrs. Arthur Guerrazzi.)

Q. (By Mr. Marcussen): Who was the man from Andersen & Company?

A. One was Mr. Oefinger, and I believe there was also one other man. [214]

Q. Did you see Mr. Oefinger here in the courtroom? A. I did.

Q. Did Mr. Oefinger or anybody else from his office take down the contents of the entries in that book on a piece of paper or in any other manner?

A. They must have taken the entries down in order to file the income tax forms.

Mr. Marcussen: That is all, if Your Honor please.

The Court: That is all, Mrs. Guerrazzi.

(Witness excused.)

Mr. Brookes: I would like to call as my next witness, Mr. Oefinger.

Whereupon

GEORGE OEFINGER

was called as a witness on behalf of the Petitioner and having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: George Oefinger, 405 Montgomery Street, San Francisco, California.

Q. (By Mr. Brookes): Mr. Oefinger, what is your occupation?

A. I am a Certified Public Accountant.

(Testimony of George Oefinger.)

Q. Are you connected with any firm of Certified Public Accountants? [215]

A. Yes, I am a partner in the firm of Arthur Andersen & Company.

Q. Are you—were you acquainted in 1943 with Giulio Particelli? A. Yes, I was.

Q. Did you perform any services for him at any time? A. I did.

Q. Did you—what years did you do so?

A. My first connection with Mr. Particelli was along about September, 1943, at which time he was referred to us by one of the bankers in Sebastopol for the purpose of assisting him in the preparation of the declaration returns.

Q. Do you recall any reason why the bank referred Mr. Particelli to you?

A. Yes, I believe it was because Mr. Particelli felt that he required income tax assistance in connection with the preparation of his returns.

Q. Were you employed by Mr. Particelli to supervise his records or make an audit?

A. We made no audit or supervision of his records, no, sir.

Q. Mr. Oefinger, the record shows by stipulation that in December of 1943, Mr. Particelli sold certain wine and winery known as the Lucca Winery to the Tiara Products Company. The record also shows that there was an agreement of sale entered [216] into between Mr. Particelli and Mr. John Dumbra for these properties and that the Tiara was the undisclosed principal of Mr. John

(Testimony of George Oefinger.)

Dumbra who entered into the contract with Mr. Particelli. Did you have any knowledge of the existence of these facts prior to my telling you that the record showed them? A. Yes.

Q. How did your knowledge of that fact come about?

A. Well, it came about in this way. It was early in December, 1943, that Mr. Particelli and Mr. John Dumbra and an accountant of his, I believe from Sacramento, came to my office to discuss a proposed sale by Mr. Particelli of his winery and wine to Mr. Dumbra.

Mr. Marcussen: Who did you say came with him?

The Witness: He had an accountant, I believe from Sacramento, California, who came along with Mr. Dumbra and Mr. Particelli.

Q. (By Mr. Brookes): Were there later conferences between these parties at which you were present?

A. Not between all of them, no. As a matter of fact, at that conference, I believe it was, that a decision was reached as to the sale of the wine and winery.

Q. How did they happen to come into your office?

A. Well, I had had contacts with Mr. Particelli earlier [217] in the year in connection with the preparation of his declaration returns and at that time he had inferred that he had a number of dif-

(Testimony of George Oefinger.)

ferent people up there in Forestville from time to time——

Mr. Marcussen: I can't hear you, will you speak louder?

The Witness: —— and at that time he inferred that he had had a number of different people up at Forestville from time to time who were interested in the acquisition of his winery, and he realized, of course, that he had certain tax problems that were involved and that was the purpose of his visit to my office.

Q. (By Mr. Brookes): Then he brought the parties into your office but he was consulting you?

A. That's right.

Q. Is that what you mean?

A. That's right.

Q. What did he consult you about, Mr. Oefinger?

A. Well, his primary concern was about the sale of the wine. In other words, he realized, as I had told him before and I think he knew of his own knowledge, that there was a ceiling price that had been established by the OPA on the sale of wine, and he knew because I had so informed him that if any wine was sold in bulk in excess of that—of that ceiling price, he was subject to penalties which might go as high as [218] three times the difference between the price at which it might be sold and the ceiling price.

Q. When he brought these parties to your office, did he consult you then about the ceiling price?

A. Yes, he did. As a matter of fact, he asked

(Testimony of George Oefinger.)

me to make a determination as to what the ceiling price would be in this particular instance, which I proceeded to do.

Q. What did you tell him was the ceiling price?

A. I told him after I completed the computation. I told him in my judgment the ceiling price for that wine was not in excess of 28 cents a gallon.

Q. Did he ask you whether the ceiling price applied to the sale of his entire wine stock?

A. Yes, he did. I informed him that it did. In my judgment, it did.

Q. At this conference, you have referred to the agreement for the sale of the wine at this conference, and I think you also said that at that same conference he agreed to sell the winery?

A. That's right.

Q. Did I understand you correctly?

A. Oh, yes, that's correct.

Q. You have testified that he, if I recall your testimony correctly, that he seemed to be interested in the ceiling price of the wine and consulted you in connection with that? [219]

A. That is right.

Q. Was it your impression at the time he came to your office that he had agreed to sell the wine or that he had entered into any agreement at all?

A. It was my understanding that no agreement whatever had been entered into and that all that these parties came to me primarily for the purpose of determining what the ceiling price on the wine

(Testimony of George Oefinger.)

was so that they could agree or disagree upon a price.

Q. Then how did the winery come into the picture?

A. Well, the winery was to be sold at the same time: That was my understanding, that Mr. Dumbra was interested not only in purchasing the wine, but the winery as well.

Q. Was there any discussion of the price to be paid for the winery in your presence?

A. Well, that all came out, of course, during the course of the conference, yes. That is, after I had told him what the ceiling price would be on the wine. Then they did discuss what would be paid for the wine and what would be paid for the plant.

Q. Was that last word "winery"?

A. Yes, winery; I said "plant" but I meant winery, of course.

Q. In referring to the ceiling price of 28 cents, Mr. Oefinger, was that 28 cents a gallon? [220]

A. 28 cents per gallon.

Q. Does that include the State and Federal Alcohol Taxes? A. No, sir.

Q. They would be added to that?

A. They would be added to that price, that is right.

Mr. Marcussen: Mr. Reporter, will you read the last few questions and answers?

(The last four questions and answers were read by the reporter.)

Q. (By Mr. Brookes): Mr. Oefinger, do you

(Testimony of George Oefinger.)

know the price that the parties agreed on for the sale of the wine? A. Yes, sir, I do.

Q. What is it?

Mr. Marcussen: I object to that on the ground it is hearsay.

Mr. Brookes: Your Honor, he was present.

The Court: Overruled.

The Witness: That price was $77,000, computed by multiplying 275,000 gallons by 28 cents per gallon.

Q. (By Mr. Brookes): Did you hear the parties state the price of the winery? A. I did.

Q. What did you hear them say?

A. $273,000.

Q. Did you hear anything else that the parties stated that would indicate to you that either of those prices was not the real price? A. None.

Mr. Marcussen: I object to that as calling for the conclusion of the witness, if Your Honor please; it requires his interpretation.

The Court: I will sustain the objection.

Mr. Brookes: I will attempt to restate the question. Before doing so, may I state my purpose in the line of questioning I am now entering upon? The Government has stated that in its opinion this was a sham transaction. I suppose by that the Government must mean that the agreement was something different than the face of it. This witness has testified that he was present at a conference between the buyer and seller at which they stated the price, and he negotiated a sales contract. I don't know how

(Testimony of George Oefinger.)

it's possible to prove that the transaction was a sham transaction unless there be a certain amount of what might be regarded as circumstantial evidence leading to it. Now, I will attempt to refrain from leading the witness.

Mr. Marcussen: If Your Honor please, it hasn't been established that this witness is a lawyer and is qualified to [222] pass—to make a conclusion or give an interpretation in the legal effect.

The Court: That would not be competent if he was a lawyer.

Mr. Brookes: I am not asking for that, Your Honor, I am attempting to get the witness' impression if these parties were sincere.

The Court: You ask him on facts to which he was a witness, statements that would come in here as facts, to which he was a witness.

Q. (By Mr. Brookes): Mr. Oefinger, did you hear any statements by either Mr. Particelli or Mr. Dumbra indicating that Mr. Dumbra was paying more than $77,000 for the wine?

A. None whatever.

The Court: Wait a minute.

Mr. Marcussen: I object on the ground it calls for the conclusion of the witness.

The Court: I will sustain the objection. What we are interested in here is what occurred at that conference, not what he might infer as to what didn't occur.

The Witness: I will be glad to explain what occurred if you want.

(Testimony of George Oefinger.)

Q. (By Mr. Brookes): Will you state what occurred at the conference? [223]

A. Yes, after I computed the ceiling price on this wine and determined that ceiling price was $77,000, Mr. Particelli and Mr. Dumbra got together and they agreed upon a price for the wine and the winery. They said the price for the wine shall be $77,000, and the price for the winery shall be $273,000, and after they had come to an agreement, Mr. Particelli contacted an attorney by the name of Fred Foster. He was brought into the picture and he drew up the agreement on that basis.

The Court: That is all you heard?

The Witness: I heard all of that.

The Court: And that is all you heard?

The Witness: That's right.

Q. (By Mr. Brookes): Did you state whether you were present at a later conference between Mr. Dumbra and Mr. Particelli?

A. The agreement was signed that day; I don't believe we had a later conference. If so, it had no relation to this deal.

Mr. Marcussen: Mr. Brookes, may I interrupt to ask the reporter to make a notation in his record of the question immediately preceding the last one and the answer?

The Court: We will take a recess for about 10 minutes.

(Whereupon a recess was had.) [224]

The Court: You may cross examine.

(Testimony of George Oefinger.)

Cross Examination

Q. (By Mr. Marcussen): Now, Mr. Oefinger, I think you testified that you had advised Mr. Particelli that if he sold the wine in connection with the winery that the OPA regulations, price regulations, would apply to the sale of the wine, is that correct?

A. If he sold the wine, that would have to be at the OPA ceiling prices, that is right.

Q. Now, if you told him that, that was wrong wasn't it?

A. Nothing wrong with that, no sir.

Q. You still think that is correct advice?

A. Sale of the wine at a figure in excess of the OPA?

Q. I am talking about the sale of wine and the winery together all in one transaction. That is the way you understood that occurred, isn't it?

A. No.

Q. That is not what you said?

A. I said a price was fixed on the wine and a price on the winery.

Q. Did you see the memorandum agreement that they signed? A. The contract?

Q. Yes, certainly.

A Now, I will show you Exhibit A-1 attached to the stipulation in these proceedings and ask you to look at that, [225] and I will ask you if that is the agreement as you remember it?

A. That's right.

Q. Is that it? A. That is it.

(Testimony of George Oefinger.)

Q. Now, did they mention that figure of $350,000 to you?

A. The $77,000 plus the $273,000 equals——

Q. Did they mention the figure of $350,000 to you, Mr. Oefinger? A. When?

Q. At the conference that you had with these parties, was Mr. Dumbra present?

A. Mr. Dumbra was present.

Q. And Mr. Particelli?

A. Yes, he was present.

Q. And that was a conference that you had after a previous conference with Mr. Particelli alone, is that right? A. That's right.

Q. Now, at that conference at which both parties were present, did they mention the figure of $350,000?

A. The figure of $350,000 was mentioned, sure.

Q. Yes, it was. Now, that was the total price for the sale of the wine and the winery?

A. That is the total price in accordance with the [227] provisions of the agreement, certainly.

Q. Now, if you advised them that the sale of the wine in that manner together with the winery must be subject to the OPA regulations, your advice was incorrect, wasn't it? A. No, sir.

Q. You don't know that to be a fact?

A. No, sir.

Q. Did you look up the OPA regulations and interpretations?

A. I looked up the OPA regulations, yes, sir.

Q. And did you refer to the interpretations

(Testimony of George Oefinger.)

under those regulations at all?

A. I referred to everything that was in the record on it at that time, yes, sir.

Q. At that time? A. Yes.

Q. Did you ever look up or recall seeing an interpretation given by the Office of Price Administration on September 22, 1942, to this effect: "The sale of a going business where a person sells his business as such, including a sale of goodwill, as well as his stock of goods, the sale is not subject to the regulations, although there is involved a sale of commodities. The transaction is not within the framework of the regulations, and the sale of the commodities may be regarded as simply a part of the sale of going business, which as such is not controlled." [228]

Now, do you ever recall seeing an interpretation of that effect?

A. I will say this, I don't recall having seen that, but had I seen it, I would still not follow it because I would consider it contrary to the regulations, yes, sir.

Mr. Marcussen: If Your Honor please, I move that the answer be stricken on the ground that it was not responsive to the question in so far as he considered it to be contrary to the regulations.

The Court: Well, it was non-responsive to this particular question. You asked him whether his advice was wrong, previously, in previous questions; as far as this particular question is concerned, it

(Testimony of George Oefinger.)

was non-responsive. You asked him if he had seen this regulation.

Mr. Marcussen: Yes.

The Court: That part of the answer may be stricken which follows his response to whether or not he had seen that interpretation of the regulations.

Q. (By Mr. Marcussen): Now, if you had seen that regulation when you gave—purported to give advice about this situation, Mr. Oefinger, you would have called it to their attention, would you?

A. That is not a regulation, as I recall it, and I think I stated that that was an interpretation.

Q. You are correct, that is an interpretation.

A. The regulations——

The Court: Just answer the question.

Q. (By Mr. Marcussen): Would you have called this interpretation to the attention of Mr. Particelli and Mr. Dumbra if you had seen it?

A. Not necessarily. Not if I didn't think it was the correct interpretation of the regulations.

Q. You wouldn't have thought that had to be called to their attention at all?

A. Not necessarily.

Q. Well, I think that will do on that. Now you referred to a first conversation that you had with Mr. Particelli some time in the latter part of 1943 when he consulted you about his estimated—his declarations of estimated tax for 1943?

A. That's right, along about September, 1943.

Q. Yes, and did you also testify that at that time,

(Testimony of George Oefinger.)

he had said that he had several inquiries concerning the possible sale by him of his wine and winery together?

A. Not necessarily at that time. Not necessarily on the occasion of my first conference with him.

Q. In subsequent conferences?

A. Yes, because I saw him at different periods all through the balance of that year.

Q. Did you explain to him that the sale of his winery [229] would be subject to capital gains tax and that the sale of his wine would be subject to ordinary—the ordinary tax on ordinary income?

A. Yes, certainly.

Q. You explained the difference to him?

A. Certainly.

Q. Now, how did you arrive at a price of 28 cents in giving him your advice?

A. Well, to give you that definitely, I would have to refer to my working papers.

Q. Do you have them with you? A. Yes.

Q. Would you refer to them.

A. I would be glad to. Shall I proceed?

Q. Yes, may I see the page you are referring to?

A. Well, I am referring to all of these notes that we made at that time. The base price on table wine at this time under the OPA Regulations was 21-½ cents. Then there was a permitted tax increase in cost per gallon of .0519, and then there was a blanket increase allowed under the regulations of .0085. That totaled .2754. We used 28 cents as being the nearest cent.

(Testimony of George Oefinger.)

Q. In other words, you applied—took the figure of some 21 cents? A. 27.54. [230]

Q. No, the original figure was 21 cents, and where did you get the figure of 21-½ cents?

A. That figure is mentioned in the regulations.

Q. What regulation?

A. The OPA Regulation covering the sale of wine.

Q. Yes, and when was that particular regulation issued?

A. Well, I can't tell you that offhand, but it was in existence.

Q. Don't your notes show it?

A. No, I don't necessarily make a record in my notes of the exact date on which the regulation was issued.

Q. Did you prepare a protest which the taxpayer filed in this case with the Bureau of Internal Revenue? A. Yes, I did.

Q. Do you have a copy of that before you?

A. Yes.

Q. Will you refer to that?

A. Yes, that's right, I did.

Q. Now, will you refer to page 5 of that?

A. Yes, sir.

Q. Of that document? A. Yes.

Q. And I will ask you to look at that page and ask you whether that refreshes your recollection as to what regulation you are referring to? [231]

A. Supplemental Regulation No. 14 under the General Maximum Price Regulation.

(Testimony of George Oefinger.)

Q. Do you know when that was promulgated?

A. Not offhand, no.

Q. Then that is where you got the figure of 21-½ cents from?

A. Under Section 2.2, yes, Maximum Prices for California Grape Wine.

Q. And then I will refer you to page 7 of that Protest. A. Yes sir.

Q. And at the foot of the page you will note a tabulation? A. That's right.

Q. And calling your attention to that tabulation, it refers to permitted increases after November 1, 1942, doesn't it? A. That's right.

Q. Now, can you identify the regulation from which you received the information pertaining to the permitted increases?

A. Well, under Section 2.2, paragraph b, it states, "Permitted increase, on and after November 1, 1942, any vintner may add to the maximum prices established for him under said section 1499.2 or to his base maximum prices for California grape wine established under (a), a permitted increase per gallon for dessert and table wine computed as hereinafter prescribed."

Q. The permitted increases, in other words, are, according [232] to you, part of that same regulation to which you referred? A. That's right.

Q. Now, I take it that in your work you have had considerable occasion to advise people about these regulations in connection with their accounting problems, that is, the OPA price regulations?

(Testimony of George Oefinger.)

A. Not too much, no.

Q. Your office would, wouldn't it?

A. The office would as a whole, yes.

Q. And you had the OPA service in your office?

A. That's right.

Q. For that purpose? A. That's right.

Q. And there were men who were in your office who were quite familiar with that?

A. That's right.

Q. And you did a considerable amount of that work? A. Not too much, no.

Q. You felt you had done enough to advise this man, Mr. Particelli, competently, did you?

A. I felt so, yes.

Q. And how long had you been associated with the firm of Arthur Andersen?

A. Since February, 1927.

Q. And you are a partner in this firm? [233]

A. That is right.

Q. How long have you been a partner?

A. For about six years.

Q. Now, did you ever hear of M.P.R. 445, Amendment 3?

A. No, I can't say specifically that I did, know it by that number.

Q. Were you familiar with the fact that a regulation was adopted on October 7, 1943, effective October 1, which permitted a winery that didn't have a higher ceiling than 28 cents for red wine and 33 cents for white wine to use those figures as their ceilings? A. No.

(Testimony of George Oefinger.)

Q. You weren't familiar with that?

A. No.

Q. On the occasion that Mr. Particelli or someone on his behalf first consulted you in 1943, did you go to his store in Forestville?

A. The first communication I had with him was by way of letter, yes, after that I did, in connection with his preparation of amended declaration of returns and also in connection with the preparation of the income tax return for the calendar year of 1943. I visited the place up in Forestville.

Q. Did you talk to Mrs. Guerrazzi?

A. Yes.

Q. Did you ask her for the records? [234]

A. That's right.

Q. For the year 1943? A. That is right.

Q. Did they present you with those records?

A. That's right.

Q. And did she give you a book containing information concerning expenses and income?

A. That's right.

Q. Did you take that book with you?

A. I did not.

Q. You left it there?

A. I left it there.

Q. Did you ever have that book in your office?

A. Not to my recollection.

Q. Did you take down any information from that book? A. I did.

Q. And did you prepare the 1943 income tax return? A. I did.

(Testimony of George Oefinger.)

Q. And did you use that information?

A. I did.

Q. Do you have the book now?

A. I do not.

Q. Do you know where it is? A. No, sir.

Q. Do you have a copy of the 1943 return with you? [235] A. Yes, sir, I do.

Q. Will you refer to it, please? I call your attention to——

A. Wait until I see if I can find it.

Q. Oh, I beg your pardon.

A. I have here only the pencilled copy from which the typed copy, I presume, was prepared.

Q. Can you check it and ascertain to your satisfaction whether or not it is complete?

A. Yes, I would say it is complete.

Q. Now, will you please refer to Schedule C(2) which appears to be a typewritten statement attached to the return?

A. Schedule C(2), yes, sir.

Q. Did you get the figure of wine sales therein in the amount of $240,653.22 from the books?

A. Not in complete detail, no.

Q. Do you know how that figure is composed, any detail on it? A. Yes, I have a detail.

Q. Will you state it, please? Just tell me when you find it, Mr. Oefinger, and I would like to ask you another question before——

A. I am back on my working papers now, because, as I mentioned, that paper was not all taken —well, that is, made up—— [236]

(Testimony of George Oefinger.)

Q. Don't answer the question as to what it is made up of, please. You have located detail on it?

A. I have located the detail making of $240,653.22, that is right.

Q. Before I go further with that, I want to ask you, did you ever recall showing this book of accounts to Mr. Gould, the Revenue Agent here?

A. No, I don't recall it, no.

Q. Do you know whether you did or—strike that. Would you say that you never did?

A. I don't recall ever having shown it to him, no.

Q. But you are not certain whether you ever did? A. I am not absolutely certain, no.

Q. Now, I also wanted to ask you about Arthur Andersen & Company. They are a national firm of accountants, are they not? A. That's right.

Q. Of rather high repute, aren't they?

A. That's right.

Q. Now, will you give me the breakdown?

A. The breakdown?

Mr. Brookes: Before the witness answers, I want to interpose my usual objection to the irrelevancy of the line of questioning. There is no issue between us on the point which Counsel is now interrogating the witness. It is a fishing expedition as near as I can tell and for what purpose I have no idea. [237]

Mr. Marcussen: If Your Honor please, it is very pertinent to establish just how the taxpayer computed his income. I want to establish by this witness what the items are that went into the sales. The

(Testimony of George Oefinger.)

taxpayer has introduced testimony on his behalf here to the effect that he sold at ceiling prices. Now, if I must explain to Counsel, I will explain to Counsel that I am going to demonstrate that he didn't sell at ceiling prices and that he sold at substantially in excess of ceiling prices by the line of questioning I am pursuing at this time. That is information, and that is an aspect of the case.

The Court: I think on the question of relevancy, probably the objection should be overruled. It is overruled.

Mr. Brookes: Mr. Reporter, will you read the question back?

(The last question was read by the reporter.)

The Witness: Breakdown of the $240,653.22 figure, right?

Q. (By Mr. Marcussen): Yes.

A. Well, that is made up of $136,250.77, $24,040.00, $2,522.01, $77,000.00, $840.44.

Q. Where did you get the figure of $136,250, some odd dollars?

A. That figure came out of the day book, this little [238] black book that you referred to.

Q. How big was that book?

A. Oh, I would say it's about 15 inches by 6, 7, 15 by 7, 15 by 8, possibly.

Q. Now, where did the next figure come from, of $24,040.00?

A. That is an adjustment figure here which it looks like represented receivables that were collected.

(Testimony of George Oefinger.)

Q. I didn't hear that.

A. Receivables, apparently, that were outstanding at the beginning of the year and were collected during the year 1943.

Q. Receivables outstanding at the beginning of the year that were collected during 1943?

The Court: Beginning of the year 1943?

The Witness: That is right. The same with the $2,522.01.

Q. (By Mr. Marcussen): Why were they different accounts?

A. That I don't know. I can't tell you that definitely.

Q. Your papers don't show where you got that sum? A. No, no.

Q. And the $77,000 is the wine of the Tiara sale? A. That's right.

Q. What about the $840.44 item? [239]

A. The $840.44, my papers don't clearly indicate just what that represents, but I think it has something to do with retail sales.

Q. Retail sales? A. Yes.

Q. At that store? But you don't have that for sure there? A. No.

Q. Now, did you ask any questions about the $136,250.77?

A. Well, the $136,250.77 figure came out of this day book. I don't normally ask questions, but all of the accounts that are in the book when I am preparing a tax return, some of—you have got to assume that they are correct until you make a de-

(Testimony of George Oefinger.)

tailed audit, of course. In this case we made no audit, as I intimated earlier.

Q. You examined all the records that were available? A. That's right, that's right.

Q. What did you mean, then, that you didn't make a detailed audit, what did you mean by that?

A. If you are going to make a detailed audit, of course you have got to go into these things much more thoroughly than we did in the—you would have to send out confirmations on all the receivables, undoubtedly check all the expenses, all the invoices, and do a considerable amount of work before we could satisfy ourselves that the accounts correctly presented the [240] values of operations for the period.

Q. Did you file this return on the cash or accrual basis?

A. That return was filed on a cash basis.

Q. And I suppose you had ascertained that those receivable accounts had actually been collected?

A. That's right.

Q. And I presume that you also ascertained that the 136,000 some odd dollars represented sales that had been made during the year 1943 and for which the money had been received?

A. For which the money was received in any event, yes.

Q. Now, referring to the item of $28,040.73 which is listed beneath that as inventory of wine, January 1, 1943, where did you get that figure?

A. That figure, as I recall, came off the 1942 re-

(Testimony of George Oefinger.)

turn. That was the closing inventory at the end of 1942.

Q. Did you prepare that return?

A. We did not prepare the '42 return, no, sir.

Q. Where did you get the figure of $53,303.68 for wine and liquor purchased?

A. That is a combination of six items; I will call them off if you like.

Q. Will you please?

A. Wine purchased, Roma Wine Company, $6,306.07; Northern Sonoma Wines, $21,452.98; Italian Swiss Colony, $10,769.24; beer purchases, $1,779.65; wines and liquors, $2,757.74; wine [241] stamps, $10,238.00.

Q. Do you know what the tax is per gallon on the sale of dry wine?

A. I don't recall offhand, no.

Q. Now, referring to the next item, the grapes purchased, $117,618.73, what is your source on that?

A. That was this day book, the so-called day book.

Q. Was it a lump sum in the day book?

Mr. Brookes: Your Honor, I object to the question and also ask that the last question and answer be stricken from the record. There was no ceiling price on grapes. We were told by Counsel that the relevance of this line of questioning was that he was going to show that Mr. Particelli was selling his wine at over-ceiling price. There is no issue between us as to the cost of the grapes, as to their basis or figure of that kind. I see no relevance to any of the

(Testimony of George Oefinger.)

issues in the case and I do not see that this has the slightest tendency to prove what Mr. Marcussen said he was seeking to prove.

The Court: Do you concede that statement?

Mr. Marcussen: I will withdraw the question, Your Honor.

The Court: All right.

Q. (By Mr. Marcussen): Now, referring to the item of labor cost, where did [242] you get that?

Mr. Brookes: Your Honor, the same objection. There was no ceiling on the price that this man could charge for day labor.

Mr. Marcussen: If Your Honor please, I would like to establish that fact for the same reason that I advanced with respect to the wine sales.

Mr. Brookes: Your Honor, he means that he is about to prove what sales of wine for over a price was in excess of ceiling by proving what the labor costs were. There is no tendency of labor cost to prove what the ceiling price of wine was or the sales or anything of that sort.

Mr. Marcussen: If Your Honor, please, I am not prepared at the present time to submit to Counsel a detailed computation of what my figures are. I do know, however, that figure is relevant and I am advised that it is relevant by an accountant and I would like to have that in the record for the purpose of establishing the computation which I, in case——

Mr. Brookes: He has identified it was the sales of wine for a price in excess of the ceiling. I sub-

(Testimony of George Oefinger.)

mit to Your Honor that neither his assurance that he thinks it is relevant nor the assurance that he states an accountant told him it was relevant are sufficient.

Mr. Marcussen: I will say, if Your Honor please, there have been a number of businesses in which this taxpayer [243] was involved during the taxable year. He had a retail store, he sold some wine at retail, some at wholesale, and he also made bulk sales of wine in large quantites. Now, I want to know why that is allocable, what was the labor cost that is identified on that figure on the return. That is what I want to know and I want to know just what department of the taxpayer that is properly chargeable to, to determine the income.

Mr. Brookes: This is not an audit of the taxpayer's income tax returns. This is a trial before the Court on one issue. There is no assertion of an additional deficiency, the audit has been concluded. Certain deficiency has been asserted, certain deficiency stipulated to. One has been withdrawn and the remaining at issue.

Mr. Marcussen: If Your Honor please, the Government contends that this contract and the income reported from it have been reported as a sham, and I wish to show that the taxpayer actually made sales above the ceiling prices, and, in order to do that, I have got to identify certain of these items on this return.

The Court: Does it pertain to the item here involved?

(Testimony of George Oefinger.)

Mr. Marcussen: Yes, it does, Your Honor. I think I know what the item is.

The Court: I will overrule the objection. Frankly, it's a little difficult for me to see the relevancy.

Mr. Brookes: May I have an exception? [244]

The Court: You may have an exception.

The Witness: I take it you refer to the $3,874.68, is that correct?

Q. (By Mr. Marcussen): No, I am referring to the item of labor cost. A. $11,000?

Q. $11,553.34?

A. Well, that is made up of two items, one of which appeared on that black book.

Q. Will you state them?

A. That was referred to as labor during crushing, $1,553.34, and then there was a $10,000 bonus that was paid at the end of the year.

Q. To whom?

A. Mrs. Guerrazzi and Arthur Guerrazzi.

Q. Is it customary to put bonuses into labor costs? A. Certainly.

Q. Did you ascertain what that payment was for? A. Payment for services, I presume.

Q. Did you ascertain what services they were?

A. No, that is not a part of my——

Mr. Brookes: My objection, I think this illustrates rather forcibly—we have stipulated that this very item is properly deductible in computing the income for this year. What relevance has this question? [245]

(Testimony of George Oefinger.)

The Court: I think they are developing into quite a fishing expedition here at this point.

Mr. Marcussen: I will withdraw the question.

The Court: Some of it I don't see the relevancy of.

Mr. Marcussen: I will withdraw the last question.

Q. (By Mr. Marcussen): I hand you the 1943 income tax return of Mr. Particelli, Mr. Oefinger, and ask you whether you can identify it?

A. Yes, that is it; I am sure that is it.

Q. Now, with respect to the other items appearing on this page, the same schedule C(2) on the return—strike that please.

Mr. Marcussen: If Your Honor please, I would like to offer the return in evidence as Respondent's next exhibit in order.

The Court: Admitted as Respondent's Exhibit S.

(Whereupon the document marked Respondent's Exhibit S for identification was received.)

Q. (By Mr. Marcussen): Now, referring to that schedule, Mr. Oefinger, you will note it contains a list of expenses there? A. That's right.

Q. Did they all come out of that day book too?

A. Substantially all of them; there may be a few [246] adjustments, of course, that were made to some of those accounts.

Q. But substantially all of the information comes from that book? A. That's right.

Mr. Marcussen: That is all, Your Honor.

(Testimony of George Oefinger.)

The Court: Redirect examination.

Redirect Examination

Q. (By Mr. Brookes): Mr. Oefinger, do you remember the date of the enactment of the Price Stabilization Act?

A. I don't recall it offhand now.

Q. Would it refresh your memory to tell you that it is known as the Price Stabilization Act of October, 1942? A. Yes.

Q. Mr. Marcussen asked you whether in your study of the ceiling price applicable to this wine, you ran into the—encountered the ruling which I —an interpretation which I think he said was dated September 22, 1942; as I recall, you stated you did not find it? A. That's right.

Q. Would you have considered rulings dated prior to the enactment of the Price Stabilization Act relevant to your inquiry?

A. Certainly not.

Mr. Brookes: I have no further questions. [247]

The Court: That is all, Mr. Oefinger. We will adjourn until 2:00 o'clock this afternoon.

(Witness excused.)

(Whereupon, at 12:30 p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [248]

Afternoon Session

The Court: You may proceed.

Mr. Brookes: I would like to call my next witness Mr. A. M. Mull, Jr.

Whereupon

A. M. MULL, JR.

was called as a witness on behalf of the Petitioner and having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: A. M. Mull, Jr., 515 Capitol National Bank Building, Sacramento, California.

Q. (By Mr. Brookes): Mr. Mull, will you state your occupation?

A. I am an attorney-at-law, regularly admitted in all of the courts of the State of California, in the Federal Court for the Northern District of California, and Supreme Court of the United States Circuit Court, Ninth Circuit.

Q. In what city do you have your office?

A. Sacramento, California.

Q. Are you the A. M. Mull, Jr., who is President of the State Bar? A. Yes, I am.

Q. Mr. Mull, I hand you stipulated Exhibit B-2 on which the name A. M. Mull, Jr., is signed as attorney for the Tiara [249] Products Company. Do you recall having seen and signed that paper?

A. Yes, I do.

Q. Then you are the A. M. Mull who signed that as attorney for the Tiara Products Company?

A. I am.

Q. Had you represented either John Dumbra or the Tiara Products prior to this transaction?

A. I don't recall having represented Tiara Prod-

(Testimony of A. M. Mull, Jr.)

ucts Company, but I had represented John Dumbra.

Q. In the course of representing Tiara Products Company, in the transaction in which you signed your name as attorney in fact to the Exhibit B-2, did you learn what the business of the Tiara Products Company was? A. Yes, I did.

Q. What was it? A. Wine business.

Q. All kinds of wine?

A. Well, I don't recall whether they dealt in all kinds of wine, but I do know that they dealt in dry wines and sweet wines.

Q. Will you please, Mr. Mull, tell the Court what you know of this transaction in which the Exhibit B-2 is a part?

A. May I have the exhibit?

Q. Yes. If it will refresh your memory, Mr. Mull, [250] Exhibit B-2 is one of the two documents which has been stipulated as the exhibit signed by you.

A. Well, to the best of my recollection, I will try to review—I gave Mr. Marcussen a number of papers from my file.

Q. This is stipulated to be a copy, a true copy of the document signed by A. M. Mull, Jr., on behalf of Tiara Products Company, and it states that it is the instructions to the Bank of Sonoma County for placing in escrow the check and the wine, the latter sold by G. Particelli to Tiara Products Company; Exhibit C-3 is a document signed by A. M. Mull, Jr., Tiara Products Company, Incorporated, and addressed to the Bank of Sonoma County, giv-

(Testimony of A. M. Mull, Jr.)

ing escrow instructions for placing in escrow both the Lucca Winery and check in payment for the purchase of the Lucca Winery, and I am asking you to describe for the Court your connection with the transaction.

Mr. Marcussen: If your Honor please, that is objected to on the ground that the documents speak for themselves. Mr. Mull was the attorney.

The Court: Well, he is not, as I understand it, asking what the documents show.

Mr. Brookes: I am not asking what the documents show. I will state the question differently. If I ask it in the most direct way, I anticipate an objection that I was leading the witness.

Mr. Marcussen: Thank you, Counsel. [251]

Q. (By Mr. Brookes): By whom were you first contacted in relation to the transaction in which you represented the Tiara Products Company in the purchase by Tiara Products Company of wine and winery from Mr. Particelli?

A. From John Dumbra.

Q. On what occasion did he first contact you?

A. Well, I have said, I knew that I would probably be a witness in this matter and I tried to refresh my recollection, and in my file I have quite a memorandum that I dictated on December 10, 1943.

Q. Counsel, you have reference to that memorandum from which you refreshed your recollection so that you are able to speak from your recollection?

A. To some extent. I think that I could. Whatever I say now will be my best recollection as re-

(Testimony of A. M. Mull, Jr.)

freshed from this document.

Mr. Marcussen: Can you testify without referring to the document?

The Witness: I think I can, although I won't say that my memory isn't anything of this document also.

Mr. Marcussen: You will testify then, without referring to the document?

The Witness: To the best of my ability. On December 5, 1943, I received a telephone call from John Dumbra, and he [252] asked me to get in touch with a Mr. Edmund A. Knittle, who is associated with Darrel Hodge & Company, Certified Public Accountants, in Sacramento, and to have him, Mr. Dumbra, meet him. Now, I don't recall from my own knowledge where he said to meet him, although this memorandum says at a certain place. I have no recollection. I thought—my best recollection would have been to have him meet him in San Francisco, but to meet him and go with him to close a transaction in connection with the Lucca Winery. I conveyed the information to Mr. Knittle. I don't have any independent recollection as to whether or not John Dumbra explained to me the transaction. I did convey the information that Mr. Dumbra wanted Mr. Knittle to meet him, and the next thing I heard——

Mr. Marcussen: May I interrupt just a moment. If your Honor please, I would like to interpose an objection on the ground that all of this is wholly

(Testimony of A. M. Mull, Jr.)

immaterial and has no connection with the issues in the case.

The Court: Overruled.

The Witness: The next thing that came to my attention in connection with this matter was that a document came into my possession. Now, I don't know who gave it to me, but it purported to be an agreement between John Dumbra and Mr. Particelli.

Mr. Marcussen: Are you referring to Exhibit 1-A in the stipulation? [253]

The Witness: I am not familiar with the document.

Mr. Brookes: That is a stipulated exhibit, Mr. Mull.

The Witness: Yes. I have a copy of this.

Q. (By Mr. Brookes): It was a document of which Exhibit 1-A is a copy?

A. Yes, it was, on a legal size paper.

Q. Had that document been signed?

A. The document I had was just a copy.

Q. A copy of an instrument?

A. And had John Dumbra and I think Mr. G. Particelli.

Q. Did you understand that there was an original which had been signed at that time or before that time?

A. I understood there was an original of that document.

Q. A signed original, Mr. Mull?

A. Yes, that there had been an agreement signed

(Testimony of A. M. Mull, Jr.)

by John Dumbra and G. Particelli. It was my understanding.

Q. Were you asked to do anything at that point in connection with this transaction?

A. Yes, I was.

Q. What were you asked to do?

A. I was asked to get in touch with Mr. Lorton of the Lawrence Warehouse Company for the purpose of getting him to go to Forestville to investigate the possibilities of creating a Lawrence Bond Warehouse upon the premises for loan purposes, and also to get in touch with—I don't know whether [254] this is before that or after, but to get in touch with a George Spillman at the Capitol National Bank in connection with the account of John Dumbra to be sure that there were sufficient funds there for the purpose of making good on the $5,000 check, and I did that. I got in touch with Mr. Lorton and he said he couldn't go there personally, and Mr. Dumbra insisted that he go there personally, and a few days later, I don't know the exact date, Mr. Lorton and I met him up there at Forestville, and there were other people present at that time, but I don't recall who exactly, although I think John Dumbra was there and I think Mr. Knittle was there. I have a memoranda which indicates that that happened, and I don't have any memorandum—my memorandum doesn't show the date, it says December.

Q. Were you—did you, Mr. Mull, prepare the document signed by you which is in the record as

(Testimony of A. M. Mull, Jr.)
Exhibit B-2, which I place before you?

A. I don't recall whether I did or not. At least, I had a part in preparing it, and I know I didn't type that document. I am quite certain, to my best recollection, I didn't type it. I think it was typed probably at the Bank of Sonoma County. I have seen a copy of it and the typing isn't from my office.

Q. Do you recall whether or not you dictated it?

A. No, I don't, but I could very well have done so, but I don't recall whether I did or not.

Q. But, did you have instructions—withdraw that. Did [255] you have instructions from Tiara Products Company as to what you were to do in representing them? A. Yes, I did.

Q. Did you have instructions from Tiara Products Company what the transaction was in which you were to represent them? A. Yes, I did.

Q. When you signed this document entitled and identified in this record as Exhibit B-2, on behalf of Tiara Products Company, did you understand that the document was consistent with the instructions which you have been given by your client?

A. Yes, I did.

Q. I ask you, Mr. Mull, to look at Exhibit C-3, which likewise you testified is a copy of a document signed by you, on behalf of Tiara Products Company. Did you dictate that document, the original of this document?

A. I don't recall, but it was submitted to me. I approved it and it was probably a composite work

(Testimony of A. M. Mull, Jr.)

of the attorney for Mr. Particelli and myself. He had an attorney in the transaction also.

Mr. Marcussen: Could you identify him at this point?

The Court: Whether he is here, by name?

Mr. Marcussen: Yes.

The Witness: His name is Fred Foster, Fred J. Foster, in San Francisco. [256]

Q. (By Mr. Brookes): Is this document which you signed but which you have testified you did not dictate consistent with the instructions as you understood them that you had from your client?

A. Well, I am not positive about that. The instructions contemplated also a dealing with the Alcohol Tax Unit in connection with the transfer of certain licenses which were in the name of Mr. Particelli, and this document of December 21 was superseded by later instructions of December 28. This deal was not closed on the basis of Exhibit C-3.

Q. Yes. I had overlooked that. Exhibit D-4 is a stipulated exhibit, stipulated to be a copy of an original which likewise is signed by you and which is dated December 28.

Mr. Marcussen: We should correct that.

Mr. Brookes: There should be a date on the top.

Mr. Marcussen: Shall we stipulate about that?

Mr. Brookes: We will stipulate that the original shows the date of December 28, 1943, on the upper righthand corner.

Mr. Marcussen: On Exhibit D-4, so stipulated.

Q. (By Mr. Brookes): Is this document, Mr.

(Testimony of A. M. Mull, Jr.)

Exhibit B-2, which I place before you?

A. I don't recall whether I did or not. At least, I had a part in preparing it, and I know I didn't type that document. I am quite certain, to my best recollection, I didn't type it. I think it was typed probably at the Bank of Sonoma County. I have seen a copy of it and the typing isn't from my office.

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Q. Did you have instructions from Tiara Products Company what the transaction was in which you were to represent them? A. Yes, I did.

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(Testimony of A. M. Mull, Jr.)

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Mr. Marcussen: On Exhibit D-4, so stipulated.

Q. (By Mr. Brookes): Is this document, Mr.

(Testimony of A. M. Mull, Jr.)

Mull, a copy of the original signed by you?

A. Looks like it, yes.

Q. This, then, would be your signature which appears on this copy? [257] A. Yes.

Q. Was this document, Mr. Mull, consistent with the instructions as you understood them to be given to you by your client? A. Yes.

Q. Did your client give you any other instructions in connection with this transaction?

A. Well, there were a number of other points that had to be covered in connection with it. We had —there was on contact Mr. Robert F. Wiseman of H. E. Myhall Company. They are alcohol tax advisers, and they took care of the transfer of the basic permit upon the wine, and——

Q. May I interrupt, Mr. Mull? The question probably was too broad. Were you given any other instructions by your client in relation to the terms of sale, to the terms of purchase?

A. Well, there are a lot of different items in connection with the sale, the insurance upon the title, there was fire insurance, and the alcohol tax advice.

Q. Did these other instructions relate to the price?

A. Oh, no, no. I might give you the detail of how the transaction was closed if you would like to have that.

Mr. Brookes: Are you agreeable, Counsel?

Mr. Marcussen: I think I know what you want him to say, Mr. Brookes. [258]

(Testimony of A. M. Mull, Jr.)

Mr. Brookes: I am through.

Mr. Marcussen: You are through?

Mr. Brookes: Yes, I have no further questions. I am not interested in bringing out—it's in relation to some extension that was given, and they were not material.

Mr. Marcussen: I don't think that is what the witness had in mind.

The Witness: No, I didn't know what I had in mind, I was trying to explore everything.

Mr. Brookes: I thought you were going to talk about some extensions. There were extensions given, your Honor. Will you answer, then, as you were about to, please?

Mr. Marcussen: I think you should restate the question. Will you read the question, Mr. Reporter?

(The last question and answer were read by the reporter.)

The Witness: The Tiara Products Company sent to me two checks, one for—and my memory has been refreshed on this—one for $330,000 and one for $15,000. Those checks were signed by the Tiara Products Company and there was no payee named in there and there was no date. I had authorization to fill in the name of the payee. I think, as I recall, the reason why there was no payee is because we didn't know whether this matter was going to be closed at the bank or the title company. I wanted to be sure that we made the checks out to [259] the proper party so I went to—I think this bank is in Sebastopol, the Sonoma County Bank, and at that

(Testimony of A. M. Mull, Jr.)

time took these two checks and made them out to Bank of Sonoma County, and put in the date, December 21.

Mr. Marcussen: I should think it would be appropriate to ask at this point how it feels to have someone send a blank check for $330,000?

The Witness: I felt very complimented, and at that time I delivered these two checks to Mr. Hotle. I remember him quite well because his brother, I think, was a classmate of mine at high school. He was the representative of the Bank of Sonoma County. We delivered these two checks to him with the instructions—may I refer to your exhibits?

Q. (By Mr. Brookes): Yes.

A. Exhibit B-2, and C-3, both dated December 21, 1943. Now, then, later we went back, went back there, and we took the cancelled instructions of Exhibit C-3, and substituted therefor instructions D-4, and those checks that I had given him cleared. The escrow then went into effect. I think they cleared before December 31, either the 29 or 30, around there.

Mr. Marcussen: The checks?

The Witness: Yes, the two checks that I had given him.

Mr. Marcussen: Mr. Brookes, do we have those here? Where are those? We have both seen them, the originals, they [260] were not put in evidence were they?

Mr. Brookes: The stipulation states that there were two checks.

(Testimony of A. M. Mull, Jr.)

Mr. Marcussen: Did you ascertain before coming here, the date on which those checks had cleared, Mr. Mull?

The Witness: Yes, either 29 or 30.

Mr. Marcussen: The 29th or 30th, that is your best recollection?

The Witness: It was definitely, I am sure, either one of those two dates.

Q. (By Mr. Brookes): You have completed your answer, have you not, Mr. Mull?

A. I hope I have given you all the—I think there might be other things that you might be interested in, but I would be glad to answer the questions on a specific basis.

Q. Did Mr. Dumbra tell you what price he was paying for the wine?

A. Well, he—I believe there is a letter that I wrote, a memorandum of some kind, authorizing that it was $77,000 for the wine.

Mr. Marcussen: Well, now, may I ask, do you have a recollection of this or are you relying upon this record you referred to, Mr. Mull?

The Witness: I am relying upon all the documents. I [261] can't tell at this moment whether or not—I have seen these figures, I have seen the documents again since you contacted me, Mr. Marcussen. I reviewed the file, and tried to familiarize myself with them at your request.

Mr. Marcussen: Could I interrupt to ask the reporter to read that last question and answer?

(Testimony of A. M. Mull, Jr.)

(Last question and answer were read by the reporter.)

Mr. Marcussen: Do you have an independent recollection of that apart from any letter? Do you have an independent recollection now of whether Mr. Dumbra of the Tiara Products Company told you he was buying the wine for $77,000?

The Witness: Well, I can never say on a certain date he told me that he was buying the wine for $77,000.

Mr. Marcussen: At any time, Mr. Mull?

The Witness: But it seems to me to be inconceivable as a lawyer that I could have drawn and supervised the drawing of these papers saying that $77,000 was being paid, given to the bank for so much wine, and he not have told me that that was what he was paying for it.

Mr. Marcussen: But you don't remember the specific conversation with him to that effect, do you?

The Witness: I know that if I say that I knew that, you will say the date and the time and place, and I have no recollection as to any date that he—particular date that he might have said **that to me,** but I thought there was a memorandum [262] that I gave you——

Mr. Brookes: This is your own memorandum, Mr. Mull?

The Witness: Yes, it is.

Q. (By Mr. Brookes): Does it refresh your recollection to the point where your memory of the transaction is actually your memory of the trans-

(Testimony of A. M. Mull, Jr.)

action, and not your memory of what you read on this paper?

Mr. Marcussen: I will stipulate that this may go into evidence.

Mr. Brookes: I wouldn't like it; this is a memorandum. I am trying to get Mr. Mull's recollection; if Mr. Mull has no recollection then I have no wish. I have no wish to have any evidence on it. It appears to me that the witness is uncertain whether he has any recollection of the precise date that he was told what the precise price was. I will, therefore,—I would like to withdraw the question. I have one more, perhaps two more questions to ask the witness.

Mr. Marcussen: Very well.

Q. (By Mr. Brookes): Did Mr. Dumbra tell you, do you recall whether at any time Mr. Dumbra told you what the price was which he was paying for the wines; let me clarify that, Mr. Mull. I am not asking you to remember what the figure was, merely if Mr. Dumbra told you what the figure was at some time. [263] A. Yes, he did.

Q. Do you believe that the documents which you prepared were consistent with your instructions from him relating to the price of the wine?

A. Yes, I do.

Mr. Brookes: I have no further questions.

The Court: Cross examination.

Cross Examination

Q. (By Mr. Marcussen): Now, Mr. Mull, do

(Testimony of A. M. Mull, Jr.)

you recollect whether or not the first check for $330,000 was attempted to be cleared and it came back with a notation of, "Not Sufficient Funds"?

A. Well, the check was sent—this is only what Mr. Hotle told me—the check was sent in.

Q. Do you know?

A. I wasn't in New York; as I recall it, Mr. Hotle stated to me that the two checks—I don't know if it was one or two—had not cleared, and I got in touch with Mr. Dumbra within a period of a day, I guess—a couple of days. They must have cleared, somebody told me that. I don't know of my own knowledge, but there was a delay of a couple —few days in there. They were not certified checks.

Q. Well now, it's a stipulated fact in this case, Mr. Mull, that on December 21, 1943, at the time Exhibits B-2 and C-3 of this stipulation which are letters dated December 21, at [264] the time that they were submitted to the bank, that there was also delivered to the bank two checks drawn by Tiara Products Company in favor of the bank in the respective amounts of $330,000 and $15,000, both dated December 21. Now, I want you to bear that in mind, that particular paragraph of the stipulation, and I am referring now to Exhibit B-2 and C-3. I will call you attention to the fact that the first letter addressed to the bank by Tiara Products Company by you, as attorney, states, "We are enclosing herewith our check for $77,000 which you are to deliver to G. Particelli when he has delivered to you a bill of sale," and then it goes on, "a bill of sale

(Testimony of A. M. Mull, Jr.)

to 256,000 gallons of dry table wine located at the Lucca Winery at Forestville, California, and 19,000 gallons of dry table wine located in the Scatena Bros. Winery, Healdsburg, California," and then you are given certain instructions with respect—you are giving to the bank certain instructions with respect to that bank and that Exhibit C-3, attached to the stipulation, which opens up with a statement, "We are enclosing herewith the sum of $268,000 which represents the purchase price of the Lucca Winery and the purchase of all the equipment and personal property now contained therein." I would like to call your attention to that and ask if you have any explanation as to why a reference is made to a check for $77,000 for wine, and another—or rather, another sum of $268,000 for the winery when, in fact, the checks submitted were two checks in the [265] amounts of $330,000 and $15,000. Can you explain that? A. I think I can.

Q. Will you do so?

A. We gave the bank $345,000 and we told them to use $77,000 for one purpose, and $268,000 for another purpose. Perhaps it would have been better language to have put in the Exhibit B-2 "and hand you herewith the sum of—" as we did in the Exhibit C-3, but there was actually no check given to them. But, they certainly understood, they had $77,000 of our money—Tiara's money.

Q. Now, do you recall whether or not Tiara Products Company gave you instructions to sell the winery immediately after that, in the next few

(Testimony of A. M. Mull, Jr.)

months following that transaction?

A. Yes, they did.

Q. After the escrow was discharged?

A. Yes, you said a few months, but I thought you might have been thinking of December. It was some time after May of 1944.

Q. Now, I hand you this typewritten sheet which is a memorandum from your file from which you refreshed your recollection a moment ago with respect to instructions you had received about $77,000 for wine, and simply ask you to identify that.

A. This is from my file, but I don't know that I stated that I refreshed my recollection from that.

Mr. Marcussen: If your Honor please, my recollection of the testimony was that the witness did refresh his recollection from this document, and I would like to offer it in evidence as Respondent's Exhibit next in order.

Mr. Brookes: Your Honor, I object. The main function that a document taken from a witness' file, a memorandum dictated by the witness to serve his —to refresh his recollection and cannot itself serve as evidence of the truth of the facts that are stated in that memorandum dictated for his own use.

The Court: It would be hearsay in any event, whether it refreshed his recollection or not. Objection sustained.

Q. (By Mr. Marcussen): You weren't consulted by the Tiara Products Company prior to the time of the date of sale of December 6, were you?

A. About this transaction?

(Testimony of A. M. Mull, Jr.)

Q. Yes.

A. I think I have given just about what happened. John Dumbra called me, and asked me to get ahold of Ed Knittle, and I wasn't asked to do anything in connection with the transaction.

Q. You didn't advise them with respect to the legality of the OPA aspects of it or income tax aspects of it? A. At that time, or any time?

Q. Yes, prior to December 6.

A. No, sir. In fact, I knew nothing about the actual [267] details until this document, as I recall, was handed to me.

Mr. Marcussen: That is all, your Honor.

The Court: That is all, Mr. Mull.

Mr. Brookes: May I ask a question?

The Court: Oh, yes.

Redirect Examination

Q. (By Mr. Brookes): Mr. Marcussen asked you whether you had advised Mr. John Dumbra about the legality of the transaction by which he specified he meant the income tax consequences, the OPA consequences, I think, approximately, is the language that he used, and certain other consequences before December 6, and you answered "No". Were you consulted by them or did you advise them with respect to those matters at any time after December 6?

Mr. Marcussen: I object to that, if your Honor please, on the ground it is incompetent, irrelevant

(Testimony of A. M. Mull, Jr.)

and immaterial what he advised them after this transaction.

The Court: I will sustain the objection.

Mr. Brookes: No further questions, your Honor.

(Witness excused.)

* * * * * [268]

Whereupon

HARRY P. MEYERS

was called as a witness on behalf of the Respondent and having been first duly sworn, testified as follows: [271]

Direct Examination

The Clerk: State your name and address, please.

The Witness: Harry P. Meyers, Geyserville, California.

Q. (By Mr. Marcussen): What is your occupation?

A. At the present time it's farming.

Q. Are you connected with the Northern Sonoma Wine Company?

A. I was manager at one time, but I am still Director on the Board.

Q. When were you manager?

A. Oh, from '34 to about '45.

Q. Yes. I hand you this—strike that, please. I hand you Respondent's Exhibit T for identification, and ask you if you know what that is.

A. These are all copies that you and Mr. Gould took from our files at Geyserville, wines that we sold to Lucca Wine Company back in '43.

(Testimony of Harry P. Meyers.)

Q. And what are they, invoices?

A. They are copies of invoices that were sent out with the wine at that time.

Q. Sales to whom?

A. Lucca Wine Company.

Q. And for what period of time?

A. Well, they are all for '43, except I see—there is [272] one invoice here for '42.

Q. December 29, 1942?

A. That's right.

Q. What is the earliest one for '43?

A. There is one January 5. I imagine there wasn't any before that.

Q. Yes. What is the latest one for 1943?

A. June the 8th.

Q. And was this file subpoenaed by the Bureau of Internal Revenue? A. It was.

Q. And you surrendered it to Mr. Gould?

A. I did.

Q. In my presence? A. That's right.

Q. Now, you said "our files." Whose file?

A. Northern Sonoma Wine.

Q. Is that a cooperative?

A. It is, yes.

Q. And when was it organized?

A. It was first organized, they took over the winery from the Geyserville Growers, in '38, and I don't remember just when the Northern Sonoma Winery was organized, but it was around '37, '38, in there.

Mr. Marcussen: I offer this as Respondent's Ex-

(Testimony of Harry P. Meyers.)

hibit [273] next in order, if your Honor please.

The Court: Exhibit T?

Mr. Marcussen: Yes.

The Court: Admitted.

(Whereupon the document marked Respondent's Exhibit T for identification was received.)

Mr. Marcussen: And I will ask Mr. Brookes whether he will stipulate that these are the invoices covering sales which Mr. Particelli testified were made to him by Geyserville Growers.

Mr. Brookes: I stipulate, Counsel, that when Mr. Particelli referred to Geyserville Growers as a source of some of the wine he bought, he was refering to the company known, or the winery known as the Northern Sonoma Wines.

Mr. Marcussen: That is sufficient. I know you are correct in your form of the stipulation. I didn't mean to place a misinterpretation on it.

Mr. Brookes: I stated it differently than you did, Counsel, because I am sure there are sales earlier than this.

Q. (By Mr. Marcussen): Mr. Meyers, do you recall the day you obtained those files for Mr. Gould? A. Do I remember the day?

Q. Yes, I do not mean the date, I mean do you remember the occasion? [274]

A. You mean when you and Mr. Gould were up there?

Q. Yes.

A. I asked permission from——

(Testimony of Harry P. Meyers.)

Q. I am not asking you what you did, do you remember the occasion now?

A. I do, yes. I don't remember the day any more.

Q. Will you state whether or not that is a complete record, or is that a complete file of the invoices of shipments of wine, dry and sweet wine, made to Mr. Particelli for the year 1943?

A. I couldn't say that that was all of it. You know those files, they were taken out of the regular files, put in a box in the back room, and I haven't gone through them since you and Mr. Gould were up there.

Q. When you submitted that file to Mr. Gould, did you submit to him all of the invoices covering purchases by Mr. Particelli for the year 1943?

A. Well, if you remember, Mr. Rose, the present wine manager, knew where these boxes were filed and he assisted Mr. Gould in digging out this file, and they came out in the office with the file.

Q. Didn't he assist you in getting that file?

A. He assisted me, both of us, I guess.

Q. You looked through the files, too?

A. I looked through the file. [275]

Q. You didn't find any other invoices?

A. No, I didn't.

Q. You have no reason to believe, do you, that the files as you gave them to Mr. Gould were not the entire files covering all of the 1943 transactions?

A. As far as I know, that was all that was in that folder, and that is all there was.

(Testimony of Harry P. Meyers.)

Mr. Marcussen: Yes, that is all.

The Court: Cross examination.

Cross Examination

Mr. Brookes: No questions.

The Court: That is all, Mr. Meyers.

(Witness excused.)

Mr. Marcussen: Call Mr. Mondavi.

Whereupon

ROBERT MONDAVI

was called as a witness on behalf of the Respondent and having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Robert Mondavi, St. Helena, California.

Q. (By Mr. Marcussen:) What is your business? A. I am a vintner.

Q. At St. Helena? [276]

A. That's right.

Q. What is the name of the company?

A. C. Mondavi & Sons.

Q. Is C. Mondavi your father?

A. That's right.

Q. And you were about to add——

A. Also known as the Charles Krug Winery.

Q. I take it that C. Mondavi & Sons operate and own the Charles Krug Winery?

A. That's right.

No. 13503

United States
Court of Appeals
for the Ninth Circuit

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vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ESTATE OF ELETTA PARTICELLI, Deceased, and ARTHUR GUERRAZZI, Executor, Petitioners,

vs.

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 313 to 633, inclusive)

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(Testimony of Robert Mondavi.)

Q. And how long have you been in that business?

A. Since 1937, in the wine business, but not always as Charles Krug Winery.

Q. Yes. And are you the present manager of the business? A. Yes, I am.

Q. How long have you been manager?

A. Since it was founded in 1943, since we purchased the Charles Krug Winery there.

Q. When was it purchased in 1943?

A. That was in March of '43.

Q. Are you—were you in 1943 familiar with general business conditions in the wine industry?

A. Yes, I was.

Q. And were you also familiar with the pricing situation? A. Yes. [277]

Q. The OPA rules and regulations with respect to pricing of wine? A. That's right.

Q. I mean in a general way.

A. In a general way. I don't know in detail, I will put it that way.

Q. Were you then, and are you know, familiar with the marketing practices in the years 1943 and 1944? A. That's right, yes.

Q. In the wine business?

A. That is on table wines, especially.

Q. Yes, and bearing in mind those conditions, do you know what the value of table wines was in December of 1943?

Mr. Brookes: Your Honor, I object to the qualification of this witness to answer such questions of

(Testimony of Robert Mondavi.)

such a general sort. I am satisfied that this witnesss has been established as a man who knows something about the wine industry, but as a man who has had experience in it in the St. Helena region, he so testified, for several years. I understand that wine conditions differ in different parts of the state. I haven't heard that the witness has had any wine experience in other parts of the state, that he would know anything about the wine conditions and wine prices prevailing in different parts of the state.

Mr. Marcussen: I will ask him further questions, if your Honor please, in view of Counsel's objection. [278]

Q. (By Mr. Marcussen): Where is St. Helena?

A. In Napa County.

Q. Do you know where Forestville is?

A. That's right, yes.

Q. What county is that? A. Sonoma.

Q. How far apart are they?

A. Actual mileage, I don't know exactly, to be frank with you?

Q. Are the counties adjacent?

A. That's right.

Q. And approximately how far is St. Helena from Forestville?

A. I mentioned I wasn't quite certain, but I guess it would be in the neighborhood of, oh, 40 miles, I am not certain of the mileage.

Q. Are grapes grown and wine produced in both of those counties? A. That's right.

Q. And in any other counties around and adja-

(Testimony of Robert Mondavi.)

cent to those two counties? Yes, that's right.

Q. What other counties?

A. Mendocino County and Lake County, the Northern Coast Counties there. [279]

Q. Are all those counties known collectively—are those known collectively by a particular name in that region?

A. Northern Coast Counties; the fact is, there *is* thirteen of them. I can't mention them all, but there are thirteen North Coast County wineries.

Q. And to whom do the wineries in the North Coast Counties generally sell their products?

A. They sell the products, well, to either interwinery sales or to wholesalers in the East, or either they retail them direct from their premises to people.

Q. Now, I want to ask a question. I want you to simply answer that question without going any further. I want to ask you, do you know what the value of wine was in December of 1943, dry wines, I just want to ask you if you know.

A. Yes.

Q. You do know? A. Yes.

Q. I would like to have you state to the Court what that value is.

A. Well, that value varied, that is from 75 cents to about $1.00 a gallon, depending on the wine itself, and the people that were doing business with one another, the quality.

Q. When you said "depending on the wine itself", are you referring to the quality?

(Testimony of Robert Mondavi.)

A. That's right, yes. [280]

Q. Are you familiar with the fact that—well, will you state what the—do you know what the OPA flat ceilings were for table wines at that time?

A. What time do you mean, what are you referring to?

Q. In December of 1943.

A. The OPA ceilings were 28 cents for dry red and 33 for dry white wines.

Q. Yes. Now, can you explain to the Court the basis of your evaluation of 75c to $1.00 a gallon for dry wines in December of 1943, with particular reference to the fact that the OPA ceiling prices were nevertheless 28 cents and 33 cents, respectively, for red and white wines?

A. Well, at that time there seemed to have been a shortage of wine and wine was selling in glass——

Q. By "in glass" do you mean case goods?

A. In case goods, yes. That would reflect a price back to the winery of about a price of 75 to a dollar, depending on the deal made.

Q. Yes. And what was, what type of transaction would the winery—well, could a winery actually enter to—did the wineries actually enter into transactions which would net them those prices?

A. Yes, that's right, that's right.

Q. Will you describe the type of transaction or transactions you may have in mind? [281]

A. Well, the transaction was called the contract bottling arrangements that were made with wholesales in the East. It's a bottling arrangement

(Testimony of Robert Mondavi.)

made with the wholesaler in the East and whereby the winery in California shipped wine on consignment to themselves, consigned to themselves in the East, I mean the wholesaler in the East bottled the wine for the account of the winery and then the winery sold the case goods to the wholesaler in the East. In other words, that was a vehicle that was used to circumvent the price, 28 and 33 cents, to circumvent OPA prices.

Q. You said circumvent?

A. By that I meant a legal method of getting a higher price than the 28 and 33 cent price.

Q. Do you know whether the OPA during 1943 or '44 ever issued any rule and interpretation, regulation, condemning that practice in those years?

A. No, I don't. In fact, we received—no.

Q. Now, I wanted to ask you, was that method of selling wine generally known in the North wine country, North Wine Counties that you—how did you describe them?

A. North Coast Counties.

Q. North Coast Counties?

A. Yes, it was discussed quite frequently, yes.

Q. Among the various vintners?

A. That's right. Vintners would discuss it, they would [282] discuss it with the various vintners because they had a problem before them, and that was the means of trying to get a price above the OPA ceiling, and that was one of the methods discussed.

Q. Yes. Now, did C. Mondavi & Sons ever use

(Testimony of Robert Mondavi.)

that method of marketing wine? A. Yes.

Q. When did you begin to do that?

A. In October of 1943.

Q. And on the basis of those transactions, what price for the wine was reflected to C. Mondavi & Sons? A. About 85 cents a gallon.

Q. Was there any other method that you know of whereby wineries received a higher price for their wine than the OPA price ceilings would allow in sales of bulk wine alone?

A. Well, winery and wine itself was sold together, and in that way they would achieve a price for their wines.

Q. Do you know whether or not in 1942 and 1943 there were—the extent to which wine was—wine and wineries were sold together?

A. Well, I don't know. No, I don't know.

Mr. Brookes: I object to the question. The man has not been established as an expert in the value of real estate. Assuming that his qualifications as an expert on the value of wine have been established, wine is liquid and real estate is highly unliquid, and I do not see that his qualifications [283] entitle him to express any opinion whatsoever on the value of wineries, and, in essence, that is what he is doing.

The Court: He is asking if he knows of any sales of wineries and wines in one transaction?

Mr. Marcussen: That is correct, your Honor.

The Court: I will allow that.

(Testimony of Robert Mondavi.)

The Witness: I knew of sales going on, but I can't recall the names.

Q. (By Mr. Marcussen): I am not asking you for specific sales, Mr. Mondavi, but do you know whether there were a number of such sales during that time?

A. That was the—yes, that is what I heard at that time. There were sales and discussions of sales going on, and sales that had taken place.

Mr. Brookes: Your Honor, I ask that that be stricken on the ground that on its face it is hearsay.

The Court: It is hearsay.

Q. (By Mr. Marcussen): Was it common knowledge at that time? A. Yes.

Q. Did C. Mondavi & Sons ever sell a winery together with its inventory of wine?

A. Yes, yes, that's right.

Q. When? [284]

A. That was in February of 1944, the original agreement made in December of 1943.

Q. And to whom did they make the sale?

A. The sale was made to the Tiara Products Company, Inc.

Q. Do you recall whether any agreement was entered into on December 17, 1943?

A. Yes, we made an agreement with John Dumbra, in writing on paper. [285]

* * * * *

Q. (By Mr. Marcussen): Did you negotiate the sale that is described here in that memorandum?

(Testimony of Robert Mondavi.)

A. Yes, I did.

Q. Whom did you talk to?

A. John Dumbra.

Q. Do you recall what the date was when you talked to him?

A. What do you mean by that statement?

Q. Well——

A. I did talk to him on December 17, for sure, after the agreement that we made at this date.

Q. Did you talk to him prior to that time?

A. Several times before that, yes.

Q. Will you state what you said and what he said in the course of those conversations?

Mr. Brookes: Your Honor, I object to that on the ground that the matter that Counsel is preparing to go into is irrelevant. There is now in evidence a document purported to be an agreement. It is stipulated if the original is shown, it will then be in and then a document which is in agreement. The agreement speaks for itself. There is no necessity for contributing at any time or elaborating it. An agreement binding on both parties which speaks for itself.

Mr. Marcussen: If your Honor please, the materiality [287] of this document becomes clear when it is recalled that Mr. Particelli testified concerning a conversation he had with the same man for the sale of his winery, at approximately the same time. The evidence is offered for whatever value it has by way of impeachment of Mr. Particelli's testimony.

(Testimony of Robert Mondavi.)

Mr. Brookes: Your Honor, this is not a conversation, as I understand it, regarding the sale of the Particelli wine and the Particelli winery. This is a conversation regarding a sale which was made between someone represented by Mr. Mondavi and the Tiara Products Company. May I see the copy?

Mr. Marcussen: Certainly.

Mr. Brookes: This is a sale according to this of plant and wine for $90,000. This is not a sale of wine for a certain figure and a plant for a certain figure. There is no allocation between them. Counsel stated that the Government was attacking the documents representing the constituting of the transaction on the part of Mr. Particelli's sale as being a sham. For that reason, the negotiations were relevant either on the part of the Government to show that it was a sham or on the part of the taxpayer to show that it was not. I do not understand that the Government is contending that this sale also is a sham, and if the Government is contending that the sale is a sham, I fail to see its relevance.

The Court: I don't think you can impeach Mr. Particelli by bringing in a conversation or statement which Mr. Dumbra made [288] in a conversation in another transaction to which Mr. Particelli had no connection, and did not participate.

Mr. Marcussen: Very well, your Honor, I will ask another question or two.

Q. (By Mr. Marcussen): Do you know whether Mr. Dumbra at the time was—do you know what

(Testimony of Robert Mondavi.)

his business was when he came to California in December of 1943, and what his purpose was?

A. When he first came to see me, he was interested in buying wine.

Mr. Brookes: I object, your Honor. The witness' knowledge of what Mr. Dumbra's purpose was could only have come from the lips of Mr. Dumbra himself, and it is therefore hearsay. Mr. Dumbra was subpoenaed as a witness and it is stipulated that we will take his deposition in New York.

The Court: Objection sustained.

Q. (By Mr. Marcussen): Were further documents executed after the execution of this—of the one represented by Exhibit U?

A. Yes, sir. The escrow agreements drawn up at the bank.

Q. Did those agreements also—did those agreements contain an allocation of the total purchase price between wine and winery?

A. Will you repeat that again? [289]

Mr. Marcussen: Will you read the question, Mr. Reporter?

(The question was read by the reporter.)

Mr. Brookes: Your Honor, may I inquire of Counsel whether the originals of those agreements have been destroyed?

Mr. Marcussen: The agreements I am not interrogating the witness about.

Mr. Brookes: Yes, I wonder why this violation of the best evidence rule.

Q. (By Mr. Marcussen): Do you have those?

(Testimony of Robert Mondavi.)

A. The originals of the escrow agreements?

Q. Do you have those with you?

A. No, they are at the bank.

Q. Do you have copies of them?

A. I have a copy of the escrow instructions.

Q. Now, referring to those copies, can you state whether or not there was a separate allocation for wine and a separate allocation——

Mr. Brookes: Your Honor——

Mr. Marcussen: May I finish the question?

Mr. Brookes: I am going to object first, and I think you may as well know.

Mr. Marcussen: I think you might as well know the question before you object. Mr. Reporter, will you read the [290] question as far as I had gone?

(The question was read by the reporter.)

Q. (By Mr. Marcussen): ——for the winery, I asked you whether you knew?

Mr. Brookes: I object to the question—have you completed the question? It is what I understood it to be, Counsel.

Mr. Marcussen: I wanted it in the record.

Mr. Brookes: Your Honor, first, this is admitted to be a copy of a document which is in existence and, under the best evidence rule, the document itself should and can be produced. When that is done, if this is a copy, I will have no objection to the copy being substituted for the original, and then, when that is done, the document will speak for itself. It does not need any interpretation for the witness or any other witness.

(Testimony of Robert Mondavi.)

The Court: Objection well taken, sustained.

Mr. Marcussen: That is all.

Cross Examination

Q. (By Mr. Brookes): Mr. Mondavi, is it?

A. Pronounced Mondavi.

Q. Mondavi. Has all of your wine experience been in the Napa Valley? A. Yes. [291]

Q. Does not a mountain range separate the Napa Valley from the Sonoma County region?

A. True.

Q. What is its name?

A. That is called—wait a minute, I forget what the range itself is called. It's the Maycanas Mountain Range.

Q. What is the height of that range?

A. I am not certain.

Q. Do you know what the height of the range is at the point opposite St. Helena?

A. No, I don't.

Q. Do you regard it as a high mountain range?

A. Yes.

Q. I understood you to say that your winery at the present time is in St. Helena?

A. That's right.

Q. Does this range protect St. Helena from the prevailing westerly wind of California?

A. Getting rather technical there, I don't think I would be qualified to answer that.

Q. Is the top of those mountains often shrouded in fog and clouds? A. At times, yes.

(Testimony of Robert Mondavi.)

Q. Have you been to the top of those mountains?

A. Not to the top of the mountain, no. [292]

Q. Are there not vineyard lands on the top?

A. Yes, on some of the tops, yes.

Q. You have not visited those?

A. Yes, I have visited those. I didn't know whether you meant all of the tops of the ranges. I have been to most of them, but not all of them.

Q. Based on your presence at certain of the vineyards on the top of this range, did you find that it was windy up there?

A. Occasionally, it's windy, yes.

Q. Is there not a prevailing wind up there?

A. There would be, naturally.

Q. From the west?

A. By and large, I would agree with that.

Q. Is there a prevailing westerly wind in St. Helena?

A. I think you are getting a little too technical on that.

Q. Do you live in St. Helena?

A. That's right.

Q. How long have you lived there?

A. Since 1937.

Q. Do you regard St. Helena as having a warm climate? A. Not completely, no.

Q. Do you know what the range of temperatures in the summer would be there? [293]

A. Oh, it ranges from, in the summer——

Mr. Marcussen: If your Honor please, Respondent objects on the ground of immateriality of all

(Testimony of Robert Mondavi.)

this. We are not concerned with the production of grapes, it seems to me. I don't know what Counsel is driving at.

Mr. Brookes: I will tell Counsel what I am driving at. Perhaps to him it sounds like I am going far afield. I have understood for many years that the Napa Valley, and St. Helena is near the north part of the Napa Valley, is considered one of the best regions in the state for growing wine; I understand it has its exponents who will assert it is the best region in the State of California for growing wine. It may be that this witness is one of them; I don't know. The temperature, both in evenness and what is—its extremes has nothing to do with, what?

Mr. Marcussen: Wine is produced?

Mr. Brookes: Growing the grapes and producing the wine, I understand it's called "growing wine." I believe that through this witness I will be able to show through this witness that climatic conditions are less favorable in Sonoma County.

The Court: It has to do with the quality of the grapes grown, is that the idea? Objection overruled.

Q. (By Mr. Brookes): I asked you, Mr. Mondavi, if you knew what the temperature range is in the upper Napa Valley, where St. Helena is, in [294] the summer.

A. It ranges from about, oh, at certain times of the year as high as 101 or 102, or 103, for a short period of time, three or four days, and then

(Testimony of Robert Mondavi.)

it would be, in the evening it cools off very rapidly, gets around 50 and sometimes colder in the summertime.

Q. And what is the range, average normal range of temperature during the wintertime?

A. Wintertime, from almost about freezing at times, and, oh, about 85 degrees, in that neighborhood. I am not quite certain of those temperatures. I am more acquainted with those during the summer. I watch them more.

Q. Does the Napa Valley have good conditions for growing grapes for the production of dry wines?

A. We think they are excellent.

Q. Do you think that there are any other conditions in the state more favorable for growing grapes, for growing grapes for dry wines, as favorable as in the Napa Valley?

A. We prefer Napa Valley.

Q. In fact, that is why you are there, isn't it?

A. That's right.

Q. Can you run off the names, or most of the names, of the grape producers of dry table wines in California? By that I mean the ones with the reputation for producing the finest dry table wines? [295]

A. Most of them, Beaulieu, Inglenook, Beringer Bros., Louis Martini, and there is Wente, Concannon, then there is Fountain Grove and Freemark Abbey, Souverain. I would like to include Charles Krug.

Q. I think you may.

(Testimony of Robert Mondavi.)

A. I don't know, I think that is about it at the moment. I may have left out some others in Napa County, I am not certain.

Q. You left out some in Santa Clara County?

A. Almaden, and I mentioned Wente and Concannon; gee, I don't know, that is about all I can remember at the moment here. Now, if you go over the list, I can probably add more to it.

Q. I will do that. You mentioned Beaulieu, Beringer Bros., Inglenook, and, of course, Charles Krug, Fountain Grove, Wente, Concannon, and Almaden? A. Yes.

Q. Can you think of any others?

A. At the moment that is all I can think of.

Q. How many of those are in Napa Valley?

A. There is Beaulieu, Inglenook, Beringer Bros., Krug, Souverain, Louis Martini.

Q. Freemark Abbey?

A. Freemark Abbey; I guess that is about it.

Q. In 1942 and '43, would you have included Larkmead? [296] A. Yes.

Q. And that is located where?

A. In Napa Valley.

Q. How many of them are in Sonoma County?

A. Fountain Grove, that is about all I can recall at the moment.

Q. And the others are located where, in what counties?

A. At Livermore, Alameda County, and then there are others in—Almaden is in——

Q. Isn't it in Santa Clara County?

(Testimony of Robert Mondavi.)

A. Yes, Santa Clara County.

Q. Does a higher—do the wines produced by these wineries that you have named produce a higher average price than the normal average price for California dry wines? A. You mean——

Mr. Marcussen: Are you talking about current wines, Counsel?

Mr. Brookes: If the condition today is different——

Mr. Marcussen: I don't mean presently current, but I mean current wine at the time you are interrogating the witness about, 1943. I take it you are talking about——

Mr. Brookes: I will ask, in 1943.

Q. (By Mr. Brookes): Did the wines produced by these vineyards or wineries that you have mentioned have a higher price than the price other [298] wineries or that the average wine could have commanded.

A. Do you mean if they sold it at this particular day or when it was fully matured?

Q. Are these wineries—is Beaulieu, as an example, in the habit of selling wine before it's wholly matured? A. No.

Q. Is Inglenook? A. No.

Q. Are any of these wineries you have mentioned, including the Charles Krug?

A. I would like to qualify those statements to say that they do not sell under their own bottled wines, I mean their own bottles, until the wine is fully matured, before they do sell wine, interwinery.

(Testimony of Robert Mondavi.)

That is, if they have certain lots that they want to sell, but that is not too great.

Q. Now, directing your attention to the wines sold under their own labels, in 1943, were the prices prevailing for those wines higher than the prices for the average dry wines?

A. Yes, under their own labels, yes.

Mr. Marcussen: Higher than what prices?

Mr. Brookes: Than the average prevailing price for dry wines is what I asked the witness.

Q. (By Mr. Brookes): What was the typical price prevailing for a high grade wine produced by one of these wineries in 1943? [299]

A. Well, in 1943?

Q. Yes.

A. Now, that is a question—that question is a rather difficult question to answer because that wine is not sold for a period of maybe four years hence, and so if I speak to you—I mean if I make any price quotation it will be—I will have to speak on a wine that we are selling five years hence that has been fully matured. In other words, they didn't sell, and I make this clear, they do not sell wines under their own bottle immediately after it is produced. They age over three years or more before putting it on the market, for mature wine.

Q. When you said "aged," do you mean aged in the barrel or aged in the bottle or do you include both periods? A. I include both periods.

Q. And your answer as to the price commanded by such high type wines——

(Testimony of Robert Mondavi.)

A. Well, all right. That was fully matured and aged, I am qualifying the statement that way. They received—well, the prices varied in case goods. I am not certain I know their business, but it reflects our line of wine as comparable to theirs. There is that wine sold for about net to the winery, for about 5½ to 6 dollars a case, net to the winery.

Q. How many gallons in a case?

A. 2-4/10 gallon.

Mr. Marcussen: How many? [300]

The Witness: 2-4/10 gallons.

Q. (By Mr. Brookes): Now, Mr. Mondavi, will you answer the question with respect to the wines that were sold in 1943?

A. In respect to what?

Q. Fine table wines of the wineries you mentioned as being the fine wineries of California, their fine table wines sold in 1943.

A. At that time, I don't recall any fine wine sales; by fine wines—when you refer to fine wines I take it you are talking about Cabernet, Semillon, Savion Blanc, Riesling and other wines comparable to those?

Q. Those and others as well.

A. There are others, too.

Q. I am talking about wines of that sort.

A. At that time, I do not recall sales that took place inter-winery. They were holding those wines for their own bottling, and I can assure you that if there were any sales they would be quite high.

Q. Mr. Mondavi, in Sonoma County there are

(Testimony of Robert Mondavi.)

a lot of small wineries? A. Yes.

Q. What kind of wine do they produce?

A. They produce red table and white table wines.

Q. Do you consider that they produce wines of high quality? [301]

A. They produce very good wines over there.

Q. Are you speaking of finished wines?

A. Well, now, I am speaking of all wines, generally speaking. In other words, if it's competitive wine, they have a very good wine there, competitive wine, and if it's for aging like Fountain Grove, they have very good wine.

Q. If the wine has not been finished, do you regard that as a good wine? I am speaking of Sonoma County wines in particular.

A. Yes.

Q. Before it has been finished?

A. That's right. In other words—in other words, after all, your wine comes from the raw product itself, from the grape, and from there on in you need a good grape to make a good wine, and even though it's not finished it doesn't necessarily mean that the wine is not good. It's just not finished.

Q. Is it fit to drink before it's finished?

Mr. Marcussen: Counsel, I can't hear your questions.

Mr. Brookes: I asked him if it was fit to drink.

The Witness: Many times I would drink it.

Q. (By Mr. Brookes): Is there a market for it in the bottle before it is finished?

(Testimony of Robert Mondavi.)

A. Generally speaking, I would say no. [302]

Q. In 1943, what prices were you getting for the wines sold by you? A. In 1943?

Q. Yes.

A. In the latter part of 1943, we were getting on a contract bottling arrangement—now, that is during October, November and December—we were getting about 85 cents a gallon for the wine, that is, return to us, by selling the case goods.

Q. How old was the wine?

A. The wine, some of that wine during November and December, actually contained some of the 1943 production.

Q. This is wine sold in December of 1943?

A. Now, I would like to explain our entire operation, and maybe I could clarify our operation to you, if you wish.

Q. Well, if it's necessary in order to answer my question.

A. Well, we have three types of wine, our fine wine, our Charles Krug brand; then we have our Napa Vista, our medium priced wine; and then we have our competitive wine which is the everyday table wine.

Q. How old is the Charles Krug wine when it's sold?

A. The Charles Krug wine is from three years to five years old before it's put on the market. The white wine, generally speaking, will be—I would say two years old. The [303] white wines will be from two years to three years old or older,

(Testimony of Robert Mondavi.)

and the red wines are at least four years old, at least four years before going on the market.

Q. Does it take longer properly to age a red wine than a white wine? A. Yes.

Q. Is Zinfandel a red wine? A. Yes.

Q. Do you bottle any Zinfandel?

A. Yes, I do.

Q. Do you bottle it under the Charles Krug label?

A. We bottle some under the Charles Krug label, yes.

Q. And what prices were you obtaining in 1943 for wine sold under the Charles Krug label?

A. We were selling in case goods at that time, and our price net was $6 a case.

Q. When you say "in case goods" you mean in bottles?

A. Yes, in bottles, of fifths.

Q. And you said a case was 2.4 gallons?

A. That's right.

Q. At $6 a case? A. That's right.

Q. Now, your Napa Vista wines, how old were they on the average?

A. Well, now, I beg your pardon. At that time we were [304] not out with the Napa Vista line. All of our lines were to Charles Krug line.

Q. Then in 1943, you had no experience of your own with the cheaper wines?

A. Yes, then we had the C. K., and our competitive wines, the wines that we sold in gallon jugs, and also that we sold in bulk.

(Testimony of Robert Mondavi.)

Q. Was the C.K. a different wine than the one you call the competitive wine?

A. Well, the C.K. is our own bottling of competitive wines.

Q. And did you sell it differently, the competitive wine differently?

A. Yes, in other words by—let me place it this way. We had our C.K. price structure and then we had our regular contract bottling prices at that period of time. Now, we are speaking of 1943, the latter part of October, 1943?

Q. Yes. A. Yes.

Q. How old was your competitive wine?

A. As I stated, our competitive wine in October, we were selling of 1943, we were selling 1942 vintage.

Q. How many months old was that?

A. That would be about a year old, twelve months, twelve, fifteen months. [305]

Then in November and December, the latter part, I would have to check my records on this to be exact, but the latter part of November, we started to blend the 1943 crush, and shipping some of that out, also with some of the 1942.

Q. In 1943, did you sell any of the 1943 crush, blended with other wines?

A. No, later on in the year, in 1943, you mean?

Q. Yes.

A. I am not certain of that. I would have to look up my records.

Q. Did you sell unfinished wine?

(Testimony of Robert Mondavi.)

A. No, we sold all finished wine.

Q. How long did it take you to finish your wine? A. It takes about 30 days.

Q. By what process did you finish it?

A. We finish our wine by clarifying it, by chilling, chilling the wine, and filtering it.

Q. What were the prices at which you sold your competitive wine in 1943?

A. From October to the end of the year, we were selling our wines to return us through the contract bottling arrangement around 85 cents a gallon.

The Court: That was competitive wines?

The Witness: Yes. [306]

Q. (By Mr. Brookes): How old were those wines?

A. As I say, they were a blend, depending on when they were shipped, as I brought out. If they were in October, they were all of the 1942 vintage, but later on in the year, I mean, we began to blend with some '42 with some of the '43, and that is your picture there.

Q. Did this price include the tax?

A. The 85 cents return, no, that was net to us.

Q. Did that include freight?

A. No, this didn't include freight.

Q. Was that at the winery or in New York?

A. That was net to us at the winery. In other words, we charged a certain bottling charge. That is, the wholesaler was charged, I mean charged us, for the bottling. We in turn sold the finished

(Testimony of Robert Mondavi.)

or the bottled merchandise to the wholesaler. The difference between the bottling cost and what we charged them, deducting taxes and all, came to about 85 cents a gallon, 84, 85 cents a gallon.

Q. These were sales in gallon lots?

A. These were sales in gallons, half-gallons and fifths.

Q. Were there any sales in bulk of your wine?

A. From October on we made contract bottling arrangements.

Q. Did you have sales in bulk before that?

A. We had sales in bulk before that, yes. [307]

Q. What prices did you obtain for sales in bulk?

A. At what time?

Q. When you made them?

A. What do you mean?

Q. You said you stopped making them in October of 1943?

A. That's right. Well, before that—prior to that time you are speaking?

Q. Yes.

A. We made sales at 50 cents a gallon prior to that time in bulk, and even before that time. Now, are you referring further back to—I mean to the first of 1943?

Q. In 1943.

A. We made some sales at 35 cents a gallon at the beginning of 1943. We made sales at 35 cents a gallon.

Q. And in 1942, what price?

A. I am not quite so certain about the price

(Testimony of Robert Mondavi.)

in 1942, what the prices were on that. I would like to refresh my memory on that to be sure.

Q. Did I understand you to say that you stopped making sales in bulk because it ceased to be profitable? A. That's right, in October, yes.

Q. What was the ceiling price for your wine of the competitive brand in 1943, do you remember?

A. In 1943, of October, it came—the new ceiling price was 28 cents on red wine and 33 on white wine. [308]

Q. And that governed your wine as well as other wine?

A. Yes, that governed the competitive wine.

Q. The competitive wine, would it be governed, the Charles Krug wine?

A. No, because we had a previous price change on that.

Q. Had you had New York connections prior to the time that you began this contract bottling?

A. Yes.

Q. Were your connections with the same people that did your bottling under the contract bottling?

A. Yes.

Q. Had they handled your wines before?

A. Yes, they had.

Q. Had you sold to them in bulk?

A. Yes, we did.

Q. Had they handled your bottled goods as well before October, 1943?

A. Not before October, 1943, no.

Q. They handled only your bulk?

(Testimony of Robert Mondavi.)

A. The bulk, yes, outside of one distributor. I will qualify that, outside of one distributor that handled our case goods.

Q. When they got your wine in bulk, did they bottle it and sell it or did they sell it in turn in bulk? A. What was that again? [309]

Q. What did they do with your wine when they bought it in bulk?

A. They would bottle it and sell it to the trade.

Q. What was the difference in your arrangement between your sale to them in bulk and under the bottling contract?

A. Well, in our sale to them in bulk, it was an outright sale, at so many cents per gallon, invoiced then at a bulk figure; if we had a tank car, 6,000 gallons, the price was 35 cents. We would bill them accordingly, 35 cents K.M.O.

Q. And then they bottled and sold it?

A. Then they bottled it for themselves. That was their wine, when it was shipped in bulk, when we shipped it out under the contract bottling arrangement in bulk. The wine belonged to us, it was our wine, it was shipped to them. They bottled that wine.

Q. Was it shipped in carload lots?

A. It was shipped in carload lots to the account in the East. They bottled that wine for us at a contract price. We then sold them our merchandise, our bottled goods to them in cases.

Q. Whose label went on it?

A. Well, in the beginning, that is right after

(Testimony of Robert Mondavi.)

October, they had used their label, and then after that we found that we would have to use our own label on it, so we changed and made them use our own label, that is, our C.K. label. [310]

Q. When you were describing this arrangement during your examination by Mr. Marcussen, I believe that you spoke of it as a way of circumventing the OPA regulations, did you not?

A. I would say it was a method to get a higher price for our merchandise. Our wine cost us over double, about double of what the OPA ceiling price was. We paid $75 a ton for grapes in 1943, and $85 a ton for white grapes, so our cost was far in excess of the 28 cent price that was set by OPA.

Q. But by this little change in your marketing method you were able to get a price by which you were most satisfied? A. Definitely.

Q. I think your choice of words was very good. Then, when you testified that the average market value of dry wine in December of 1943 was 75 cents to $1.00 a gallon, you were referring to wine sold under this bottling arrangement, contract bottling arrangement?

A. The return, yes, would be under the contract. In other words, I would, referring to that particular phase of it, there were other methods used in other companies trying to circumvent, as you say, the OPA ceiling, and that is the way we achieved that price, the market value.

Q. Is that 75 cents to a $1.00 a gallon value that you placed on dry wines in December of 1943 an

(Testimony of Robert Mondavi.)

average value of all dry wines?

A. I would say that it was an average, between those [311] figures, at that time.

Q. And included in that average, the fine wines such as the Charles Krug brand? A. No.

Q. You testified that, did you not, that the price you received for that net was $6 for 2.41 gallons?

A. Well, if you want to place it that way, yes.

Q. And in considering this market value, you did not include the value of wine such as the Charles Krug wine?

A. No, I did not include the Charles Krug wine.

Q. Then I don't understand, Mr. Mondavi, what wines you are talking about when you said the market value of dry wines was 75 cents to $1.00 a gallon.

A. I was referring to the competitive, to the competitive wines. That is, that is what I was referring to there. In other words, I mentioned to you——

Q. The competitive wines in December of 1943?

A. Yes.

Q. But you testified that in December of 1943 your 1943 crush was not yet ready for market?

A. No, I didn't testify that way. I told you that at that time it was my assumption, no, my understanding, because it's been our practice to blend in November, the latter part of November or December, part of the 1943 crush. Now, I am not certain when that took place in this particular year. I [312] would have to check our records. I have the com-

(Testimony of Robert Mondavi.)

plete records, and I could find out.

Q. But you stated, did you not, Mr. Mondavi, that the 1943 year crush was to be finished in some degree in 1943?

A. What you asked me, you asked me a question that you had placed all of your 1943 in glass, or in bottles, or sold all of it as such. In other words, 100 per cent of 1943. My understanding of your question was did I sell 100 per cent 1943 before the end of the year.

Q. That was my question.

A. At that time I said I wasn't certain. I did not—I did not know completely because we were blending '43 and '42. Now, I don't know how much '42 I had left at that particular time and whether it carried me through, so I am not quite certain on that whether it was completely 1942 or 1943. I would say there would be a blend of '43 and '42.

Q. So when you referred to market value in December of 1943, as I now understand your testimony, you are speaking of a blend of your 1943 and '42 wine?

A. At that particular time that was what we were shipping.

Q. And sold under this contract bottling arrangement you referred to?

A. That's right. Now, as I said, I am not quite positively certain whether we sold 100 per cent 1943, at that time. I don't [313] think we did, but I would have to check my records on that.

Q. Did the change to the contract bottling ar-

(Testimony of Robert Mondavi.)

rangement step up the quantity of wine that was shipped to New York, to this outlet in New York?

A. Well, at that time, we could sell all of the wine that we had available. It did—in other words, moved out as fast as we could get it ready and ship it out.

Mr. Brookes: That concludes my examination of the witness.

Mr. Marcussen: Would you read the last question and answer, please, Mr. Reporter?

(The last question and answer were read by the reporter.)

Redirect Examination

Q. (By Mr. Marcussen): Do you know what the expression "current wines" meant in the wine industry in 1943?

A. Current wine meant the wine produced, well, I am not quite certain of that. My understanding of current wine was that it was the young wine produced the following year; in other words, in 1942, and selling the wine during 1943. The current vintage would be the 1942 vintage.

Q. Yes. Now, even in December of 1943, what wines would be embraced within the expression of current wines, if you know, as that expression was used by the OPA? [314]

Did you get my full question? What was meant as the expression was used by the OPA?

A. My understanding would be that it was the

(Testimony of Robert Mondavi.)

'42 and the '43 that was shipped at that time was current wine.

Q. Do you know how old wine could be and still be classified as current wine as that expression was used by the Office of Price Administration?

A. No, I'm afraid I would have to review that. I am not quite certain.

Q. Counsel asked you whether your evaluation of the 85 cents a gallon on the wine in December of 1943 was based upon this so-called contract or franchise bottling method, and I think you answered, "Yes, it was, and other methods." Now, what other methods did you have in mind?

A. Well, as far as we are concerned, we made a sale of winery and wine in which we were able to get better than the OPA ceiling; in other words, for the wine by—well, by selling, we sold the wine naturally at the OPA ceiling price, but our property price went up higher than the actual selling price that we could get for the property at that time.

Q. By the property, you mean the winery property? A. That's right.

Q. And a sale of that type that you have just described would reflect a value for the wine at the 85 cents, as you have just testified? [315]

A. Yes.

Q. What was the name of that winery that you sold in December of 1943?

A. Poggi Cellar.

(Testimony of Robert Mondavi.)

Q. What type of wine was that that was sold with that winery?

A. That was the crush of 1943 vintage.

Q. And that had been crushed when?

A. In September and October of 1943.

Q. And that was not finished wine, was it?

A. No, that was not finished wine. I would like —I am not quite certain whether that is finished or not. I would like to take that back, I don't recall definitely whether that was finished wine or not.

Q. Could you refresh your recollection from anything you have in your file?

A. Let me look at the record a minute.

Q. Were there any finishing facilities in the Poggi Cellar?

A. No, there were not. I can be almost certain that it was not finished, but, to really confirm it, I would like to check, but I am almost certain it was not finished.

Q. Could you obtain that information for us by tomorrow? A. Yes, I could.

The Court: Have you got the data here from which you [316] could determine that?

A. No, I haven't. I could get that.

Q. Could you ascertain that by a telephone call?

A. Yes, I think I could.

Mr. Marcussen: If Your Honor please, Counsel and I would stipulate that the witness may go to the telephone and make that telephone call providing neither he nor I talk to the witness, if that is agreeable to Your Honor.

(Testimony of Robert Mondavi.)

The Court: Well, I don't want to put too many things off until tomorrow.

Mr. Marcussen: That won't be put off until tomorrow; we will get that right now.

The Court: Do you want him to leave the stand and go and telephone?

Mr. Marcussen: As soon as we are finished with the examination.

The Court: All right.

Q. (By Mr. Marcussen): Now, with respect to ordinary table varieties of wine, is there any difference in quality between that produced in Sonoma County and that in Napa County?

A. They are different regions, as far as that is concerned, but they are classified in competitive standards as comparable in price.

Q. Yes. In other words, so far as you know, there is no [317] difference in price between ordinary wines—table variety of wines produced in those two valleys?

A. By and large, no. I would say that the two counties, there is no difference. I would like to qualify that by stating that it depends on the individual that is selling the wine, what he can get and the way he produces it.

Q. Yes. What importance does that have on the quality of wine?

A. Well, it has quite a difference. In other words, one producer, he has better facilities and will make wines better than the other, and may have a better reputation, and, due to that, is able to get

(Testimony of Robert Mondavi.)

probably a little premium over someone else.

Q. Yes.

A. But producers that are on an equal footing or equal basis in Napa and Sonoma Counties, the prices would be closely comparable. They would be comparable.

Q. In other words, is it your testimony that the cost of grapes is merely one of the items—I beg your pardon, quality of the grapes is merely one of the items in determining the value of the wine that is produced? A. That's right.

Q. Did you testify that it takes longer to age red wine than it does white wine?

A. That's right, yes. [318]

Q. And are you speaking now of higher quality red wines?

A. I am speaking of higher quality red wines, yes, and of the fully matured wines.

Q. You weren't speaking of ordinary wine, were you, ordinary table varieties, selling at ceilings of 28 and 33 cents?

A. Let's put it this way. No, I wasn't speaking of that, I say that wines that are current wines aren't fully matured. They are younger wines, but they haven't reached their perfection. In other words, fully matured wines have been aged over a period of time and reaches its acme of perfection at a certain number of years, and that is what I expressed as fully matured wines.

Q. Now, do you produce wines of approximately three different qualities at the Charles Krug?

(Testimony of Robert Mondavi.)

A. At that time we produced only two qualities because your Napa Vista, we were not selling our Napa Vista.

Q. And that was all at the Krug Winery?

A. Yes, Krug Winery.

Q. And so far as you know, is that an efficient operation for the production of wine?

A. The Krug?

Q. Yes. A. I would say average, yes.

Q. Do you know whether this contract bottling method of [319] merchandising wine which was adopted, as you testified, in October of 1943, whether that method was available to any winery which wished to adopt it?

A. I don't know what you mean by available. They would have to go—they would have to get it from—either get an attorney or by talking to other people who knew that they were doing that.

Q. Were bottlers at that time—was there a scarcity of wine at that time?

A. Yes, there was.

Q. And were bottlers making an effort to get wine under those—that type of contract at that time?

A. They were willing to do almost anything to get wine. I will put it this way, and as far as we are concerned, and as far as I know, they, the wineries here in California more or less devised the means of a contract bottling, although some were definitely aware of it in the East.

Q. And when you used the term "circumvent",

(Testimony of Robert Mondavi.)

with respect to that practice, did you mean to imply anything illegal?

A. No, definitely not. That is one reason why I hesitated on the word itself. It was a means of getting around it, legally. In other words, getting our price legally.

Q. So far as you know, franchise bottling was not a practice which was condemned in 1943 or '44 by OPA, isn't that correct? [320]

A. 1943 or '44, did you say?

Q. Yes.

A. Well, our particular firm received an O.K. from the Regional Office some time in the early part of 1944 that that method was legal.

Q. Yes.

A. At that particular time.

Q. Do you know whether this method of selling wine involved any increase in price of the wine to the consumer?

A. Yes, I think it did, yes. I am not certain about that, but—I am not certain of that statement, certain of the answer on that statement.

Q. Answer so far as you know.

A. Excuse me, let me just try to think this out.

Q. I can ask another question which I think might clarify it. Whose ceilings, whose price ceilings were used when the bottled product was sold to the public, under those conditions?

A. You mean——

Q. Who sold the bottled product to the public?

(Testimony of Robert Mondavi.)

A. The wholesaler, and they used their ceiling on that.

Q. And by the wholesaler, do you refer to the bottler? A. The bottler, yes.

Q. Yes. And what was the—that was a bottled price, wasn't it? A. That's right. [321]

Q. And was that price a price which was determined by the OPA ceilings at that time for the bottled product?

A. That was. I am not certain whether it was determined by the OPA ceilings, but it was within the framework of the OPA Regulations. In other words, in the price that we established, it was within that framework. I am not certain whether it was established by the OPA ruling itself, or by our own price ceiling.

Mr. Marcussen: That is all.

Recross Examination

Q. (By Mr. Brookes): I hand you, Mr. Mondavi, I hand you Respondent's Exhibit U, and ask you if that is the contract, copy of the contract, for the sale by you of the Poggi Winery for $90,000 which has been admitted in evidence after identification by you?

A. You mean this copy here, this was the original agreement made with John Dumbra, an individual who was talking to me on behalf of Tiara Products Company, and he wanted to put a deposit at that time although he only signed it by his name, and then later John Dumbra consigned this part

(Testimony of Robert Mondavi.)

of it over to the Tiara Products Company.

Q. But that is the contract that you identified and which is in evidence?

A. That is the contract, yes. This is the original [322] agreement made with John Dumbra.

Mr. Marcussen: Was a formal contract entered into?

The Witness: There was an escrow agreement that was set up by the bank which was a formal agreement, yes.

Mr. Brookes: Your Honor, this document has been identified by the witness, and it says that they are selling 70,000 gallons of wine in the Poggi Cellar, including sale of said Poggi plant in St. Helena, total price for the plant and wine is $90,000. I move to strike the portion of the witness' testimony beginning with Redirect Examination by Mr. Marcussen and conclude with the colloquy about the telephone conversation, on the ground that it is an attempt by the witness to state the terms of the contract in different terms than the terms of the contract itself. What he says to the extent that it amounts to testimony of an agreement is pure hearsay because it takes two to make an agreement. That is that contract and it does not say anything about the price of wine. It says $90,000 for wine and wine cellar.

The Court: What are you moving to strike?

Mr. Brookes: I am moving to strike the testimony in which he said they sold the wine for 85 cents a gallon; it doesn't say that.

(Testimony of Robert Mondavi.)

The Court: I did not hear that. He did testify about an 85 cent price for wine, but I didn't understand that had any connection with the particular deal. [323]

The Witness: No, not at all. I did not testify to that.

Mr. Brookes: May I ask the reporter to read that?

The Court: Yes.

Mr. Brookes: That is the way I understood that.

Mr. Marcussen: Before we ask that that be done, I would like to state my recollection of the testimony which would clarify it. My recollection of the testimony is that the witness said on Direct Examination by Mr. Brookes that the 85 cents price, 85 cents evaluation, or on a 75 to $1.00 evaluation which he gave for wine, and the 85 cent evaluation, were based upon the franchise method of bottling which he described and other methods. On Redirect Examination, I asked him what other methods he referred to in giving and describing his evaluation. He said then that a sale of the wine with the winery was the type of transaction he had in mind, and I don't know whether now——

Mr. Brookes: He did not stop there.

Mr. Marcussen: Did I ask him specifically with respect to—whether that evaluation is——

Mr. Brookes: It is that portion.

The Court: I wonder if the reporter can find that question; do you have an idea where it is?

(Testimony of Robert Mondavi.)

(The question referred to was read by the reporter.)

The Court: I will overrule the objection. [324]

Mr. Brookes: Your Honor, the point of my objection is, and my motion to strike is, that the contract is in evidence, and it speaks for itself. This witness is attempting to say that the contract says something else entirely different. That witness may represent one of the parties to the contract, but he cannot represent the other party to the contract, and to the extent that he is attempting to say that any other party to the contract paid this price or that price which varies from this price, it is the purest and most complete hearsay to the extent that the witness is attemping to speak as an expert witness, saying that the value of wine is 85 cents a gallon because it is based on sales at 85 cents. He is referring to a sale of wine and winery for $90,000. There is no foundation for his expert testimony except perhaps his own belief, that in computing his asking prices, he may have figures at 85 cents, but that is no assurance that the purchaser agreed that the wine was worth 85 cents and that the winery was another figure. All that the purchaser did was pay the $90,000 for the two together, so I move to strike the testimony on those grounds.

Mr. Marcussen: If Your Honor please, the witness said that the evaluation of 85 cents a gallon for wine in December of 1943 was reflected in this tract.

(Testimony of Robert Mondavi.)

Mr. Brookes: He said it was based on this con-contract.

Mr. Marcussen: It was based on this contract in part as well as the franchise method of bottling. Now, there is [325] nothing inconsistent in the agreement at all with that testimony, because it doesn't make any allocation in this agreement at all, and I will call attention to the fact that I attempted to get in evidence the agreement that was finally executed in the escrow arrangement to which Counsel objected and Your Honor ruled in his favor. I see no inconsistency.

The Court: I think the total price was $90,000 for the winery and wine. He did testify, as has been demonstrated here, that this 85 cents was reflected in the price he got from both combined; I think that the objection is not well taken. I will deny the motion to strike.

Mr. Brookes: May I be given the exception?

The Court: Granted an exception.

Q. (By Mr. Marcussen): Now, Mr. Mondavi, you stated to me during the recess that a telephone call would not reveal the information we requested a moment ago as to whether that was finished wine?

A. That's right, because if I feel I can get the information, it would come from the records at the bank. I have all the files here on hand in regard to this deal outside of what the bank may have on their own file, and if the record does show there that the wine was finished or unfinished, I could let you know accordingly. I am not certain that it was

(Testimony of Robert Mondavi.)

put down in black and white. I can't recall definitely whether that wine was finished or unfinished. [326]

Q. Would your father know about that; would anybody else know at the plant?

A. Possibly.

Q. Would you telephone and ascertain what information you can about it and——

Mr. Brookes: Do you want to wait for Recross Examination? I have one question I would like to ask him.

Q. (By Mr. Brookes): Mr. Mondavi, you testified that you obtained a ruling from the OPA in February of 1943?

A. '44, I didn't say the time, I say the first part of the year.

Q. I thought you said earlier; first part of the year '44, and the ruling was that that contract bottling arrangement was not an infringement of the national price regulations? A. That's right.

Q. Do you know whether other rulings were obtained by other vintners to the same effect before your ruling was obtained?

A. No, I didn't know that.

Mr. Marcussen: Now, Mr. Mondavi, would you make a telephone call and get what information you can about this and then come and discuss it with Counsel for Petitioner and me?

The Witness: All right, that is all for the present, then? [327]

Mr. Marcussen: Yes. Call Mr. Alberigi.

Whereupon

F. ALBERIGI

was called as a witness on behalf of the Respondent and having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: F. Alberigi.

Q. (By Mr. Marcussen): Now, Mr. Alberigi, I am going to ask you if you won't kindly raise your voice and use the very best English that you can. A. I will try.

Q. Thank you. What is your business?

A. Farmer.

Q. And where do you live?

A. Rural District, Sebastopol.

Q. How long have you lived there?

A. Oh, off and on, but I have been in the same place for the last seven years.

Q. Yes, and do you know Giulio Particelli?

A. Yes, I do.

Q. Do you see him here in the courtroom?

A. Yes, I seen him.

Q. How long have you known him? [328]

A. Well, to be sure, I would say better than fifty years.

Q. Now, did you ever have a conversation with Mr. Particelli about the sale of his winery in 1943?

A. Well——

Q. Just answer that question, whether you had the conversation. A. Yes.

Q. You did have a conversation with him?

(Testimony of F. Alberigi.)

A. Yes.

Q. When was that conversation?

A. Well, in the late part of '43.

Q. 1943?

A. Yes, the month of December. Some time in December.

Q. Where did you have that conversation with him? A. In my home.

Q. Will you tell me what Mr. Particelli said about that transaction?

Mr. Brookes: Your Honor, I object, the evidence of course asks for an answer which would be hearsay, and I wonder if Counsel will explain the purpose of asking such a question.

Mr. Marcussen: The purpose, if your Honor please, is just to put into the evidence admissions against interest.

The Court: Go ahead. [329]

Q. (By Mr. Marcussen): Will you tell the Judge what Mr. Particelli said?

A. Well, I——

Q. Speak loudly.

A. He came to the house, and we talked about different subjects, and then he told me that he sold his business and he said people that bought it want to buy wine, alone, but to make it legal on account of the OPA ceiling, I sold the winery and everything. That is what he said.

Q. What else did he say?

A. Well, he said that he got a dollar a gallon for the wine, and he sold—he had 400,000 gallons.

(Testimony of F. Alberigi.)

Q. What did he say he got for it all?

A. He got a dollar a gallon and he was going to buy a quarter of a million dollars in the city and some day we go down and help to fix it.

Q. Did he say anything about good will?

A. Yes, he said that he wants, he wants a dollar a gallon, and the rest was all thrown in, good will and the winery; he don't specify to me how much he got for the winery.

Q. He did say, however, that he threw in the winery and the good will?

A. Throw in the good will and the winery.

Q. Did he say anything about whether or not he could get a dollar a gallon if he just sold the wine?

A. Well, it was in a way, he can't explain to me to get [330] around the OPA ceiling.

Q. If he sold the wine alone?

A. If he sold the wine alone.

Q. Now, did you have any other conversations with Mr. Particelli about what he got for—on the sale of the wines prior to that time?

A. Well——

Q. Particularly with respect to his 1942 vintage?

A. One time he told me that he sold 100,000 gallons at 70 cents.

Q. A gallon?

A. A gallon, and his daughter, she was very much against selling for that price, but he thought it was the best for the business because he clear out of debts by the bank, that is what he tells me.

(Testimony of F. Alberigi.)

Q. Can you recall approximately when that conversation took place?

A. No, couldn't say that, I know it was previous to 1943.

Q. Previous to December of 1943?

A. Yes, previous.

Mr. Marcussen: That is all.

Cross Examination

Q. (By Mr. Brookes): Mr. Alberigi, did I understand you to say that Mr. [331] Particelli, previous to December, 1943—— A. Yes.

Q. ——told you that he had sold wine for 70 cents a gallon? A. Yes, 100,000 gallons.

Q. 100,000 gallons for 70 cents a gallon?

A. I recollect very well.

Q. And did I understand you to say that he did that for the purpose of paying off his debts at the bank? A. Yes.

Q. And then I understood you to say that in a later conversation Mr. Particelli told you something else?

A. Yes, what I told you just a little while ago, that in the later part of '43 he told me that he sold the whole shebang. In other words——

Q. The whole shebang? A. Yes.

Q. Is that the language he used?

A. Not the language exactly. Our conversation was in Italian and we don't use "shebang" in Italian.

Q. Did you have a synonym for it?

(Testimony of F. Alberigi.)

A. More or less.

Q. Do you remember exactly what he told you, and can you translate it into English?

A. I did my best now when I say, I translated it. [332]

Q. I am asking you if you can tell us exactly what he said; can you remember exactly what he said?

A. I told he came in the house. In the usual way, he used to call on us, you see, before he get his place. It was about three miles away, and then he stopped and sit down and talk about different subjects, and then he told me that he sold out, the business.

Q. You were speaking in Italian?

A. Yes, of course.

Q. But he did not use the word "shebang"?

A. Well, maybe slang, I learn it here.

Q. Do you remember any of the words that he did use?

A. Well, he said it in Italian, and it sounds to me like that way.

Q. And you understood then that he said he sold his wine for one dollar a gallon?

A. Yes, one dollar a gallon.

Q. And that he threw in the winery and good will?

A. Yes, and good will.

Q. Then, if he sold 274,000 gallons of wine——

(Testimony of F. Alberigi.)

A. He don't mention that to me.

Q. But, if he did, if he sold 274,000 gallons of wine and his winery and good will, what would you understand was the purchase price?

Mr. Marcussen: I object, if Your Honor please, calling for computation and being argumentative.

The Court: Overruled.

Mr. Brookes: Would you read the question, Mr. Reporter?

(The question was read by the reporter.)

The Witness: Well, I don't understand anything that way. I simply repeat what was our conversation and I couldn't estimate what was the value of the good will and the winery.

Q. (By Mr. Brookes): I understood, Mr. Alberigi, that the only thing that you were precise about was one dollar a gallon?

A. That's what he said.

Q. Can you multiply one dollar by 274,000 gallons?

A. I don't—I don't see why I should do that. You can easily do that yourself.

Mr. Brookes: Will you instruct the witness to answer?

The Court: Do you understand what he is calling for by that question?

The Witness: If he sold 275 gallons——

The Court: At one dollar a gallon?

The Witness: That would be $275,000.

Q. (By Mr. Brookes): And he threw in the winery and good will?

(Testimony of F. Alberigi.)

A. If he sold 275, he told me 400,000. Don't you want——

Q. I understand what you just told me. He told you he [334] sold 400,000 gallons of wine, so then how much did he think he sold it for?

Mr. Marcussen: I object as to what he thought.

The Court: Overruled.

The Witness: To me, he told me that he sold 400,000 gallons of wine for one dollar a gallon.

The Court: How much would that be, how much did you understand it to be?

The Witness: I don't stop to figure, to me it was $400,000, one dollar a gallon and 400,000 gallons. I don't stop to figure, I wasn't interested.

The Court: That is all right.

Q. (By Mr. Brookes): Are you on good terms with Mr. Particelli?

A. Well, I had been on good terms all the time.

Q. And you still are?

A. Lately he said I don't want to have anything to do with me for reasons and if I wish, I can tell you.

Q. Then, I take it, you are not on good terms with Mr. Particelli?

A. For me part, I am.

Q. Mr. Alberigi, did you ever threaten Mr. Particelli? A. Me?

Q. Yes, you. A. No. [335]

Q. Did you ever threaten him that—and tell him that he would be surprised what you were going to do to him to get even with him? A. Me?

(Testimony of F. Alberigi.)

Q. Yes. A. Even for what?

The Court: He asked you a question.

The Witness: No, no, I never said anything like that.

Q. (By Mr. Brookes): Not in a telephone conversation or a conversation face to face?

A. No, I haven't met him for the last couple of years.

Mr. Marcussen: For what?

The Witness: For two years.

Q. (Mr. Brookes): Have you talked with him at all for two years? A. No.

Q. Have you talked with any member of his family in the last two years?

A. Yes, I talked to the son-in-law, to his repudiated ex-wife, and his daughter.

Q. Were you a friend of his ex-wife?

A. Very much.

Q. Did you remain friendly with her within the last four years? [336]

A. To the last marriage?

Q. To the last marriage. A. Yes.

Q. And when was her death?

A. Some time in October.

Q. October of last year?

A. Yes; no, I really couldn't say. I think it was during this last winter. I went to the funeral but I don't recollect exactly when the month, to be frank with you.

Q. And when did you last have a conversation with—I think you said, Mr. Particelli's son-in-law?

(Testimony of F. Alberigi.)

A. Oh, I had a conversation about a month ago.

Q. And what was the nature of that conversation?

A. Well, the nature was that he owed me some money and he don't pay me yet so I ask him if you —you want me to use slang like—I asked the boy "When you going to pay me?"

Q. Did you ask him why they didn't send you a Christmas card?

A. I told him, why, after I had done so much for him, I served him faithfully, I don't say you don't answer, it wasn't polite not to do that.

Q. Did you quarrel over this with——

A. He raised his voice a little bit but we left in a friendly term with the promise he was going to send the money.

Q. But you didn't raise your voice? [337]

A. No, not exactly. We didn't threaten each other. I asked him what kind of a man he was. After he came over to the ranch, he had asked me to do certain things and I did, and I said, "Why don't you pay me?"

Q. Did you take sides with Mr. Particelli or the late Mrs. Particelli in their divorce?

A. No, not in the divorce, no.

Q. But you remained friendly with Mrs. Particelli? A. Always.

Q. But you are not friendly with Mr. Particelli?

A. Oh, yes, until he came back from Italy last time. In fact, I did some work for him while he was away.

(Testimony of F. Alberigi.)

Q. And why did you cease to be friendly with Mr. Particelli?

Mr. Marcussen: He didn't say he ceased to be friendly, he testified that he is friendly yet with Mr. Particelli but it's Mr. Particelli that won't talk to the witness.

Q. (By Mr. Brookes): What is the circumstances that caused you to stop speaking to each other?

A. I said to my—I wanted to meet him and explain the situation. His ex-wife, she asked me, they bade me to go and she wants to go to a lawyer. She thought when he divorced her she was—she said that he don't give her what was coming to her, and if I please go as an interpreter to the lawyer. Mrs. [338] Particelli asked me and I went, and that is why he got sore at me.

Mr. Brookes: I have no further questions of this witness.

Redirect Examination

Q. (By Mr. Marcussen): How long did you know Mr. Particelli?

A. I know over 50 years.

Q. Yes, and what did—please describe the conversation you had with Mr. Particelli about when you told him, or he inquired, whatever it was, about whether you knew that his wife had gone to a lawyer. Did you understand my question?

A. I understand your question.

Q. Just tell me about that incident.

A. He come back from Italy with the new bride.

(Testimony of F. Alberigi.)

Q. About when was that?

A. I can't recollect. It was some time—I think about on, say a year ago, when he came back. I don't remember the date, and he came over to the ranch to introduce the new bride.

Q. Yes.

A. So, we talked about different subjects. I asked how things was over there and everything and pretty soon he said, "Did you know my ex-wife is suing me?" and I don't want to get in the conversation, and I said, "Don't tell me anything."

He said, "I know all about," and I said "How do you know?" and he said to me, "How do you know?" [339]

I said to him, "Well, I was present when she went to the lawyer. I was an interpreter because she couldn't speak English and I translate the language for her."

He say, "You my friend," and I said "She is just as good friend to me."

She asked me that favor. I did. He jumped in the car, went away in a huff, and never spoke to me again.

Q. And what did Mrs. Particelli explain to you about this legal business that she had with the lawyer? A. Mrs. Particelli?

Q. Yes. A. Well, she sue him——

Mr. Brookes: Your Honor, I object——

Mr. Marcussen: If Your Honor please, it was brought out on cross examination. The witness has been impeached as being very friendly to Mr. Parti-

(Testimony of F. Alberigi.)

celli, and I am just bringing out all the facts about the circumstances.

Mr. Brookes: Your Honor, I think that hearsay of that character goes beyond—that is an effort to prove what Mrs. Particelli——

The Court: I don't think we are interested in particular what her grievance was if she had any, of what she told him. Apparently, the ill feeling grew out of the fact, as he testified, that he went down to see the lawyer with Mrs. Particelli as her interpreter. [340]

Mr. Marcussen: Very well, I will withdraw the question.

Q. (By Mr. Marcussen): Did you receive Mr. Particelli in a kindly manner when he came to you with the new bride?

A. In the usual way.

Q. In the usual way?

A. No, it wasn't no bad feeling at all. In fact, no bad feeling on my part today.

Q. Now, what was this money that the son-in-law owed you?

A. Well, he came over and asked me if I—you see, I was the only friend of Mrs. Particelli, the old lady Particelli. I was the only one really that could talk to her.

Q. By friend, you mean close friend?

A. Very close; and he came over and said, "My mother-in-law, she very sick, and we want a will, wouldn't you kindly come down to see if she is will-

(Testimony of F. Alberigi.)

ing to make will," so I say, "You know it costs money to travel."

He said, "That is all right. You will be well paid."

So I came down to the city three different times to talk with the old lady, and finally I had her agree to make a will.

Q. What did you tell her?

A. I told her, she asked me when I come down to the city, and I told her I came to take care of my affairs, made my will. [341] I asked her, "Did you make yours?" She said, "No," and then I began to talk about it. It would be very nice to make her one, and if something happened and it would be much easier for the children to have a will, and finally she said, "Well, when I get better, I will do it."

She said, "Come back next time," but finally she got worse, and she made the will without me.

Mr. Marcussen: Now, if Your Honor please, I would like to call upon Counsel to stipulate that Mr. and Mrs. Guerrazzi, that is, the daughter and son-in-law of Mr. Particelli, are the beneficiaries of the will of Mrs. Particelli, is that stipulated?

Mr. Brookes: Yes, it was stipulated several hours ago, Counsel.

Mr. Marcussen: Not in open court.

Mr. Brookes: That is true, not in open court.

Mr. Marcussen: And that the matter of participation in her estate was that about two-thirds of the property was left to her daughter and husband

(Testimony of F. Alberigi.)

jointly and the other third to her daughter.

Mr. Brookes: As I recall it, that was the proportion. Your Honor, when the witness is through, I would like to call, for the purpose of impeaching the witness, recall Mr. Particelli and also call Mr. Guerrazzi who is here in the court and about whom he has testified. [342]

The Court: You can do that on your rebuttal.

Mr. Marcussen: That is all with this witness, if Your Honor please.

Mr. Brookes: May I ask one final question?

Mr. Marcussen: Yes.

Mr. Brookes: I don't know whether I correctly understood him.

Recross Examination

Q. (By Mr. Brookes): Did I understand you to say that you advanced some money to young Mr. Guerrazzi for—that you loaned some money to Mr. Guerrazzi? A. No, no, no.

Q. Did I understand you to say that you paid for some of the expenses of the illness of Mrs. Particelli?

A. No, not at all, they had money to burn, those people. They don't have to have any money.

Q. Did you not say——

A. I said that he promised me to pay if I was coming down and convince the old lady to make a will, exactly that.

Mr. Brookes: Thank you, that is all.

Mr. Marcussen: Thank you, that is all, Mr. Al-

(Testimony of F. Alberigi.)

berigi. If Your Honor please, I would like to stipulate that Counsel may call Mr. Particelli and any other witness he wishes to impeach the witness here, for the convenience of Mr. Alberigi. [343]

The Court: You mean now, out of order?

Mr. Marcussen: Yes, out of order.

The Court: All right.

(Witness excused.)

Mr. Brookes: Mr. Particelli, will you take the stand?

Whereupon,

GIULIO PARTICELLI

having been previously duly sworn, was recalled in rebuttal on behalf of the Petitioner and testified as follows:

Direct Examination

Q. (By Mr. Brookes): Mr. Particelli, Mr. Alberigi has testified that prior to December of 1943, you told him that you sold 100,000——

Mr. Marcussen: Just a minute, I beg your pardon.

Q. (By Mr. Brookes): ——100,000 gallons of wine for 70 cents a gallon.

A. I never said nothing.

Q. I haven't asked you yet, Mr. Particelli, whether you said that. At the beginning of December, 1943, how much money did you owe the bank?

A. I forget, in December, 1943.

Q. Before the sale of your winery and your wine? A. Over $75,000. [344]

Q. Did you testify yesterday that the bank re-

(Testimony of Giulio Particelli.)

quired that all the receipts from the sale of wine be paid to the bank for application against your loan? A. Yes.

Q. If you had received $70,000 from the sale of 100,000 gallons of wine in 1943, would that have been paid to the bank to reduce your loan?

A. All the money is being paid by the bank.

Q. By the bank or to the bank, which do you mean? A. It goes to the bank.

Q. It goes to the bank. Did you at any time owe the bank as much as $140,000?

A. If I owe to the bank?

Q. Yes.

A. I think one time I owed around $140,000.

Q. When was that reduced? A. In 1943.

Q. Under what circumstances?

A. Before the crushing season.

Q. Before the crushing season?

A. In the beginning of the crushing.

Q. And how much did you borrow for the 1943 crushing season?

A. I think I borrowed 75 or 76 thousand dollars, $77,000, something like that. [345]

Q. That was in the 1943 crushing season?

A. Yes.

Q. And you have stated that in December of 1943 you owed the bank $75,000? A. Yes.

Q. When did you—did you make any substantial payments to the bank to reduce the loan?

A. When we sold this winery?

(Testimony of Giulio Particelli.)

Q. Before the sale of the winery, but after the crushing season.

A. Yes, after the crushing season.

Q. How much did you pay the bank in September and October and November of 1943?

A. I paid all the money I collected for—I don't know if I be paid in full.

Q. Do you remember how much you owed the bank in July, before the crushing season?

A. Around—I can't recall exactly.

Q. Well, do you remember approximately?

A. More than $50,000.

Q. More than $50,000?

Mr. Marcussen: May I have that last question and answer, please?

(The last question and answer were read by the reporter.) [346]

Q. (By Mr. Brookes): And then in December you owed them $75,000?

A. Yes, for buying grapes.

Q. Now, when you stated that you thought you did owe the bank $140,000, did you mean to say that there was—that that was the total amount that you had borrowed at different times? A. Yes.

Q. Did you mean to say that you owed that large a sum at any one time? A. I think——

The Court: Wait a minute, wait a minute.

Mr. Marcussen: I object on the ground that Counsel is leading the witness here and practically testifying.

The Court: He is trying to get him to explain

(Testimony of Giulio Particelli.)

the answer. I will overrule it. It is pretty difficult to question the witness.

The Witness: I don't think I owed it all at one time.

Q. (By Mr. Brookes): Would you repeat your answer?

A. I don't think I owed it all at one time, the $140,000, because I think in—during 1943, maybe some time it be reaching a $143,000 for a short time. I keep no pay every time I collect money.

Q. Mr. Particelli, did you ever tell Mr. Alberigi that [347] you sold 100,000 gallons of wine for 77 cents a gallon?

A. I never tell Mr. Alberigi nothing, I no tell nobody else my business.

Q. Did you tell Mr. Alberigi that you sold your wine and your—and threw in the winery and sold the wine for $1.00 a gallon?

A. I never said nothing to Mr. Alberigi.

Q. Did you tell him anything about the details of the sale of your wine and winery? A. No.

Q. Mr. Particelli, has Mr. Alberigi ever threatened you?

A. Yes, I tell him—me and Alberigi, we have been very friendly for 50 years. We were born in the same country, we go to school together in the Old Country, and after we come to America in California for the last, say 25 or 30 years, we have been friends. And two years ago, when I come back to Italy, I went to see Mr. Alberigi at the ranch, and I tell him, you know, shake hand and one thing and

(Testimony of Giulio Particelli.)

the other. I said, "I heard you put your nose into my family trouble."

Mr. Marcussen: You said that?

The Witness: I said that. I say, "I no expect a friend like you to bother in my family, because I take care of myself and my family."

We have a divorce, me and the wife, and we agree in Santa Rosa in divorce to pass $300 a month from my wife and [348] also the house in the city for live, 1350 Francisco, into which live, and I think my idea she can make a good living.

Mr. Marcussen: What was that agreement?

The Witness: It's in the divorce in 1947, 1946, we have the divorce and agreement, '45, '46.

The Court: Is that what you told Alberigi?

The Witness: Alberigi?

The Court: Yes.

The Witness: You no supposed to stick your nose in my business like that. The wife is by my daughter, my son-in-law. He has brought an offer to live her. Why you put—bring my wife, convinced my wife to put him in the court, spend the money. If my wife wants half, why don't you come to me. My daughter, my son-in-law, instead of giving $300 a month, I give half the property and we don't go to court.

The Court: Is that something you told Mr. Alberigi?

The Witness: Yes.

Q. (By Mr. Brookes): Did you just mean to

(Testimony of Giulio Particelli.)

testify that you then and there gave her one-half of your property?

A. I told—about this court already. The first time or second time, the second time.

Q. After you returned from Italy——

A. Yes, when I reach Santa Rosa, the attorney serve me the paper. [349]

Q. As soon as you came here?

A. And I surprised, I look at the paper, I see in court.

Q. Mr. Particelli, I don't think you understood my question because your answers have gone considerably beyond it. They are helpful to the extent in indicating background of the quarrel between yourself and Mr. Alberigi. Did you, as a result of that conversation and that episode of a quarrel with Mr. Alberigi—— A. No.

Q. Have you had a quarrel with Mr. Alberigi?

A. What?

Q. Do you know what quarrel means?

A. No, I wish you explain me.

The Court: Have a fuss?

Q. (By Mr. Brookes). Have you had a fight with Mr. Alberigi? A. No.

Q. Are you still good friends?

A. Oh, yes.

Q. Has he anything against you?

A. I don't know.

Q. Has he ever threatened you?

A. All the time we be friends for the last 50 years.

(Testimony of Giulio Particelli.)

Q. Then he has never threatened you and to harm you? A. We never fight. [350]

The Court: I don't know whether I understand —if he understands what that word "fight" means.

The Witness: You mean sued one or the other? We never do.

Q. (By Mr. Brookes): Did Mr. Alberigi ever tell you he was going to do something to harm you?

A. Well, after—the next morning I be in the city right away, when I see the paper I go to the city to see my daughter. For why do you like that, to put me to court?

Mr. Marcussen: When was that that you saw the daughter?

The Witness: Right next day I talking to Alberigi in the evening and go to my daughter and son-in-law, why you people put in court, spend money for nothing for it. If the mother wants half the property——

Q. (By Mr. Brookes): That isn't what I have asked you, and this is very interesting, but it isn't important in the case.

Mr. Marcussen: I think it is important. I would just as soon have the witness testify about it.

The Court: We are trying to get at what caused the ill feeling between Alberigi and this witness.

Q. (By Mr. Brookes): Did you have a telephone conversation with Mr. Alberigi? [351]

A. Yes.

Mr. Marcussen: When?

Mr. Brookes: I am not finished with my question.

(Testimony of Giulio Particelli.)

The Witness: About two weeks after, I have a telephone in my home at Santa Rosa, but no more than two weeks, maybe a month or a month and a half.

Q. (By Mr. Brookes): What was said in this telephone conversation?

A. You want me to explain it?

Q. I don't want the background; I am trying to find out what you said and they said.

A. He want to talk to me. All right, come down to the house.

Mr. Marcussen: Who?

The Witness: Alberigi.

Mr. Marcussen: May it be understood that I may ask these questions as I go along? I frankly say that if I wait, I simply could not cross examine.

The Court: Just so we understand. I think you can, either of you can come in and ask for a fuller understanding of his answers. That is about as far as we go.

Mr. Marcussen: What was the last answer?

(The last answer was read by the reporter.)

The Witness: And I say I down home. He answer, "I don't come down to your house." He told me I want to meet in [352] some other place—in the bank, in Sebastopol—he every morning to bring his boy to school. I say we can meet down at the bank. Even in the bank he said I don't want to meet you. He say I want to meet me some place down to Forestville.

(Testimony of Giulio Particelli.)

Why go down to Forestville to meet one or the other?

Mr. Marcussen: May I have the reporter read that answer, please?

(The last answer was read by the reporter.)

The Witness: And he say, well because I want to talk to you, Alberigi tell me. I said to Alberigi, if you want to talk to me, Mr. Alberigi, you know where I live.

Mr. Marcussen: You know where I live?

The Witness: Yes, in Sebastopol, you going to be sorry one of these days.

The Court: Who said that?

The Witness: Alberigi.

Q. (By Mr. Brookes): Will you repeat it?

A. You are going to be sorry by me, and I never talk no more until time I see him in Sebastopol, we never talk again.

Mr. Brookes: I don't think the reporter got all the first statement. Will you read back that last answer as far as you got it?

(The last answer was read by the reporter.)

Q. (By Mr. Brookes): Is that all that you said, Mr. Particelli? A. Yes.

Mr. Brookes: Very well. Have you completed your cross examination?

Mr. Marcussen: No, I haven't begun.

Mr. Brookes: You haven't?

Mr. Marcussen: No, I have not.

Mr. Brookes: I thought you were when you were asking questions.

(Testimony of Giulio Particelli.)

Mr. Marcussen: That wasn't cross examination, that was clarifying the record, Mr. Brookes.

Mr. Brookes: I see.

Cross Examination

Q. (By Mr. Marcussen): Did you owe the bank any money on October 1, 1943? A. Oh, yes.

Q. How much?

A. I don't know, I can't recall how much.

Q. Well, you had a recollection here a moment ago on figures that you owed the bank, Mr. Particelli, when you were examined by your own Counsel. Can't you make some recollections when I ask you these questions?

A. Only time I owed the money in the bank for the last pretty near two years before the 1943, 1942, 1941, they give me the money for building the winery. [354]

Q. And on October 1, at approximately the beginning of your crush for 1943, did you owe the bank any money then?

A. I don't know if I owed any money before I started in crushing or if I paid all, and I started to take some more money to buy grapes.

Q. You might have paid all by that time, is that correct? A. I don't know.

Q. Now, did you state that you paid over all the money you received in 1943 to the bank to pay off loans? A. If I sold the winery?

Q. Yes. A. I pay all.

Q. And did I understand you to say that you

(Testimony of Giulio Particelli.)

took all of the money and you had to give all of that money to the bank in order to liquidate your bank loan?

A. Put the escrow in the bank, and as soon as the money be free, I told the bank to pay itself first.

Q. I see. There was money left for you then after that, wasn't there, Mr. Particelli?

A. Yes.

Q. Now, when you went over to see Mr. Alberigi, did you have your wife with you, your new bride?

A. You mean the last time?

Q. No, this time. [355]

A. You mean the last time I been in Alberigi's home?

Q. Yes. A. My wife in the car.

Q. Didn't she go in the house?

A. No, we don't go in the house.

Q. Did you introduce Mr. Alberigi?

A. Yes.

Q. To your wife? A. Yes.

Q. You brought him out of the house to introduce him? A. No, we no go in the house.

Q. Where did you introduce Mr. Alberigi?

A. In the yard, outside.

Q. He came out of the house as you drove in?

A. When I reach the house, there is the wife is outside.

Q. His wife was outside?

A. Yes, and Mr. Alberigi also, out in the yard in front of his house.

(Testimony of Giulio Particelli.)

Q. And he came up to your car?

A. I get out of the car and I shake hands, you know, and introduce my wife to him and for his wife.

Q. And what did you say after you introduced them?

A. Nothing. I say I married again, this is my wife. She is coming from the same town, she know his mother, his father, ask him how everything be down there, so start talking [356] about Old Country.

Q. How long did you talk about the Old Country?

A. What is the people thinking down there, what is the war is doing, what the country looks like, old thing like that.

Q. And how long did that conversation go on in that manner? A. About ten minutes.

Q. About ten minutes you talk about Italy and the old times?

A. Just a few words, later, and after I ask him about this trouble, stick his nose in my family——

Q. But it was you, you say, that raised the question as to what business he had sticking his nose into your affairs?

A. After we introduced one and the other.

Q. Then you just went from this conversation, this friendly conversation about things in Italy, and then you suddenly asked him what did you go sticking your nose in my business?

(Testimony of Giulio Particelli.)

A. I asked him friend, why for he does to stick his nose in my family.

Q. You asked him that in a friendly manner, is that it?

A. We have been friends all his life. We never be mad to one or the other.

Q. And did you settle that law suit, that second law [357] suit, with your wife?

A. I settled right next week. I give her half.

Q. What did that amount to?

Mr. Brookes: I object to the marital problems of Mr. Particelli and the late Mrs. Particelli.

The Court: Sustain the objection.

Mr. Marcussen: That is all. May I have just one moment, if Your Honor please?

(Witness excused.)

Mr. Marcussen: If Your Honor please, may I retire from the courtroom for a moment to confer with this witness? I have difficulty in understanding conversation with him in low tones.

The Court: Yes. He has another witness here, I think.

Mr. Brookes: I was going to call Mr. Guerrazzi as a witness in impeachment.

Mr. Marcussen: I will wait then, if Your Honor please, and defer to Counsel.

Mr. Brookes: I want to clarify one point.

Mr. Marcussen: Will you be long? I will go out in the hall then with Mr. Alberigi.

Mr. Brookes: Mr. Guerrazzi, will you take the stand, please? [358]

Whereupon

ARTHUR GUERRAZZI

was called in rebuttal on behalf of the Petitioner and having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Arthur Guerrazzi, 1350 Francisco Street, San Francisco.

Q. (By Mr. Brooks): Do you know Mr. Alberigi who was on the stand? A. I do.

Q. How long have you known him?

A. I should say about fifteen, eighteen years.

Q. Are you the Arthur Guerrazzi who is married ried to the daughter of Giulio Particelli?

A. I am.

Q. Did the late Mrs. Particelli reside in your home after the divorce? A. She did.

Q. Did you ever—did you ask Mr. Alberigi to assist you in getting Mrs. Particelli to make a will?

A. No, I didn't.

Q. Did you ever ask Mr. Alberigi to induce Mrs. Particelli to make a will at all? A. No. [359]

Q. Did you ever promise to pay Mr. Alberigi any sum of money if he got Mrs. Particelli to make a will in your favor? A. No.

Q. Did you consider that you owed Mr. Alberigi any money? A. No.

Q. Have you any business transactions with Mr. Alberigi?

A. No, no business transactions.

Q. During the negotiation of the property settle-

(Testimony of Arthur Guerrazzi.)

ment agreement between Mrs. Particelli—the late Mrs. Particelli and——

Mr. Marcussen: Which one?

Mr. Brookes: The second one, the one which Mr. Alberigi testified to.

Q. (By Mr. Brookes): Did you counsel your—your late mother-in-law? A. What?

Q. Did you advise her and help her in these negotiations?

A. You mean on the negotiations?

Q. Yes. A. The settlement?

Q. The property settlement.

A. Yes, I did help her.

Q. Did Mr. Alberigi counsel her and help her also? A. He did help her, yes. [360]

Q. Were you paid anything for your services?

A. Yes.

Q. Was he? A. Yes.

Q. Do you know how much? A. Yes.

Q. How much? A. $1500.

Cross Examination

Q. (By Mr. Marcussen): How do you know that he received $1500?

A. I made a personal certified check and sent it to him.

Q. When was that?

A. Well, I can't recall the date.

Q. Well, approximately?

A. It was—oh, I would say, let's see—the latter part of '48, I believe it was. I am not certain.

(Testimony of Arthur Guerrazzi.)

Q. Where did you get the money?

A. It was Mrs. Particelli's money.

Q. Was that after the settlement? A. Yes.

Q. Where did you get the money?

A. It was Mrs. Particelli's, she had money.

Q. I asked where you got it, and you haven't answered me [361] yet.

A. She paid—I took it out of her bank account. She told me to make this, send this money to Mr. Particelli—I mean to Mr. Alberigi.

Q. You swear on your oath that you never had a conversation with Mr. Alberigi here in which you asked him on behalf of your wife to talk to Mr. Particelli's first wife, your wife's mother, and get her to make a will? A. No.

Q. You never had such a conversation?

A. He suggested she should make a will.

Q. He suggested it? A. Yes.

Q. Were you there; did you hear it; did you hear Mr. Alberigi make that suggestion?

A. I did once, yes.

Q. Where? A. It was at our house.

Q. You were never at any time requested to, by your wife, talk to Mr. Alberigi requesting him to urge Mrs. Particelli to make a will?

A. Definitely not.

Q. Do you know whether your wife ever did?

A. To my knowledge, she didn't. She didn't have good terms with Mr. Alberigi. [362]

Q. Your wife was not on good terms with Mr. Alberigi? A. Yes, sir.

(Testimony of Arthur Guerrazzi.)

Q. And were you not, as a matter of fact, employed by Mr. Alberigi—I beg your pardon, by Mrs. Particelli to speak to Mr. Alberigi?

A. Employed by her?

Q. Yes, to—— A. No.

Q. ——to urge him to talk to her about making a will? A. No.

Q. Have you been friendly with Mr. Alberigi?

A. Yes and no.

Q. Explain your answer, please?

A. Well, several weeks ago, he called me up. He wanted to see me. He says, "Well, you didn't—nice folks, you haven't even sent a Christmas card to me yet, the last two years."

I said, "Well, my wife sends the cards, I don't. Well, this year, my mother-in-law just passed away recently, we never sent any cards," and he said, "You know you owe me some money."

I said, "Well, it's the first time I knew, I thought everything was paid up of what Mrs. Particelli owed you," and he said, "You owe me for coming down and talking to her about a will." And I says, "Well, I don't know what money we owe you," and he says, "You owe me $50." [363]

This was the discussion.

Q. Did he say that was his expenses in making trips back and forth from time to time to see Mrs. Particelli?

A. No. At the time he came down to see her, he was down on some business or he had stayed there several times. He came down with his boy to the

(Testimony of Arthur Guerrazzi.)

doctor and he stayed there, and at that time, well, they had discussions, and I don't know what they discussed, but they were talking to each other, and also Mrs. Particelli had told me that he did mention to her about a will. He wanted her to make it, but she said she would make it of her own accord. She didn't want him around.

Q. Were you there when he talked to Mrs. Particelli about making a will?

A. I was there one time that I know of, yes.

Q. One time. Was Mrs. Guerrazzi there?

A. To my knowledge, no.

Q. She never was present? A. No.

Q. When Mr. Alberigi spoke to Mrs. Particelli about making a will? A. No.

Q. Do you know whether or not when Mrs. Particelli had made the will she did not wish to give it to the lawyer until after Mr. Alberigi had seen it?

A. No, I didn't. [364]

Q. You don't know anything about that?

A. No.

Mr. Marcussen: That is all.

(Witness excused.)

* * * * *

F. ALBERIGI

having been previously sworn was recalled in rebuttal on behalf of Respondent and testified as follows:

Further Direct Examination

Q. (By Mr. Marcussen): You testified about the conversation you had with Mr. Particelli when he

(Testimony of F. Alberigi.)

returned from Italy with his new bride?

A. Yes.

Q. Now, will you tell the Court again what the circumstances [365] were, what time it was in the day, and what—where you were, and tell about the conversation?

A. I was in my ranch.

Q. Were you outside?

A. Outside. The machine came into the yard and I recognized him, but I don't recognize the woman, so she came out, and he said, "That is my better half," that is what he said, and I said "Pleased to meet you" in Italian.

Now, I call my wife and sit down. There was a couple of benches, and we had a glass of beer.

Q. Under a tree, was it?

A. Under a tree outside. It was hot. And then we started to talk about different subjects. I asked a question about people over there, other people.

Q. How long——

A. We stayed about an hour, and then about an hour he come out and said, "Did you know the old wife, the ex-wife, is suing me?" And I said to him, "Please don't tell me, I know." He said, "How do you know?" and I said "I acted as interpreter at the lawyer's office."

And he "And you my friend, you went to interpret for her." I said, "Well, she was just as good friend as you and she asked me a favor and I did it for her."

And then he went away in a huff, that is all.

(Testimony of F. Alberigi.)

Q. And the whole conversation lasted about——

A. About an hour altogether.

Q. An hour, and how long did the pleasantries about Italy——

A. ——lasted about an hour altogether, it was nothing said about suing his wife until the end of the visit.

Q. And that was all that was said?

A. That is all that was said. "You my friend, you went to interpret for her." I said, "Well, she was just as good friend as you," and I told him there was nothing to——

Q. And thereupon he and his wife immediately left? A. Immediately left.

Q. Now, did you get any money from Mrs. Particelli?

A. Well, after the settlement, Mr. Guerrazzi and the old lady Particelli then came over to the ranch.

Q. Where did they live at the time?

A. In Francisco Street.

Q. Who owned the house at that time?

A. Mrs. Particelli, the old lady, and I had a standing order, all the time when you are in San Francisco, come sleep my place, it's not my daughter's home, it's my home she said.

Q. Yes——

A. And she said, "Frank, we settle," and I said, "I am glad, I am glad you did." She said, "How much I owe?"

Q. Now, just a moment. When she said, "We settled," whom was she referring to? [367]

(Testimony of F. Alberigi.)

A. With Mr. Particelli.

Q. Yes.

A. We settle, in other words, in a contest to court.

Q. In other words, she told you that she and Mr. Particelli settled that lawsuit?

A. Settled that lawsuit.

Q. She wasn't talking about any settlement then with you, was she?

A. No, but she called me the time to—and I said, "I am glad you did," and the more of us were talking about what Mr. Particelli transferred to her, what the settlement was.

Q. And that—what did she ask you?

A. What?

Q. Did she ask you another question then?

A. No, she asked me how much I owed you for help.

Q. And what did you say?

A. Whatever you please I say, you don't owe me nothing because we don't have a stip, we had no—what you call stipulate, to recompense, at all.

Q. Stipulate is what you said?

A. I say if you want to give me something is up to you. She said, "$2,000" and she gave me $2,000 then.

Q. Did she give it to you then?

A. No, she said, "Come to the City," so I came to the City, and she told Mr. Guerrazzi to go to the bank and give me [368] $2,000.

Q. And where did he give that to you?

(Testimony of F. Alberigi.)

A. He gave me a Cashier check.

Q. What bank was it on?

A. I think—I couldn't say, it was on Fillmore Street, Fillmore and some place over there, Fillmore and Lombard, someplace over there.

Q. Now, did you have any conversation with Mr. Particelli on the telephone after you had this conversation at your home?

A. Well, about two weeks after he left in a huff, he wrote me a letter.

Q. What did he say in the letter?

A. "Please to remit the $35 that you authorized me to disburse to your cousin in Italy," and so I went to the telephone and I say to him, "Mr. Particelli," I call him by his first name, I said, "you asked me for the $35," I say, "but you owe me more than that to me."

I said, "I did a lot of work for you." You see, when he left for Italy, he authorized me to attend—he had a trouble with a mortgage and the woman went in—the woman went about bankruptcy court, and I was supposed to go to the court, to the bankruptcy court, and listen and make a report, and go over once in a while to see how they keep the place, so I figured out he owed me $38.85, and I owe him $35.00. So I wrote to the lawyer, I say, "I am going to send you a $35.00 check [369] if you send me the $38.85," and that is what he did. That is the last conversation we had.

Q. And did you send a check for $35.00?

(Testimony of F. Alberigi.)

A. I sent him a check for $35.00 and he sent me one for $38.85.

Q. And in the course of that conversation did you ever threaten him?

A. Why should I threaten him? At my age there was no need to threaten anyone.

Q. Did you come to any agreement on the telephone that he would send you that $38 and you the $35?

A. Yes, he said, "I deny the bill," so I sent it to a lawyer. See, he had a lawyer in Santa Rosa to take care of his affairs, and I send the bill to him.

Q. Did you ask him anything about why he would go to the trouble of writing a letter to you instead of talking to you—coming to see you?

A. What the conversation was in the letter, instead of saying "you" in a friendly way, he was give me the high—like I say, "Sir."

Q. In Italian?

A. In Italian, yes, in Italian, but I still have the letter home. Instead of saying "you" as the usual way——

Q. You mean familiar way?

A. Among friends he, what you say, sir, "I don't deserve [370] such a title," I told him.

Q. Did you ever have any unpleasantry of any kind whatsoever with Mrs. Guerrazzi sitting here in the courtroom?

A. No, never had anything with her.

Q. Never, at any time? A. No.

Q. Did she avoid you at all?

(Testimony of F. Alberigi.)

A. Well, she used to come in the house and bring the mother over and then she used to go outside. She like—she don't want to get mixed up in the affairs, it was my idea, it was my idea. She never—when her mother—we was planning what to do about the regaining of her property. The girl, she never came to—in other words, she brought the mother over there, left her there and go away.

Q. Did I understand this to be her one-half of the community property?

A. That is what she was trying to—you see, the old lady, she don't know the law of the country. She thought it was like in Italy, that the woman is treated just like a servant. She don't know here in America you had some rights and then somebody put her wise and then she came to me.

Q. And asked you about it?

A. And asked me to go to the lawyer and translate whatever rights the lawyer gave.

Q. Did she say that she did not know that she had been [371] divorced?

A. She don't contest the divorce because the daughter, she don't help her.

Q. Now, I will ask you again whether or not Mr. Guerrazzi came to you and asked you to talk to Mrs. Particelli about making a will?

A. Well, he came in the yard one day, with a nice red new pickup. He said he was going hunting off some place. In the presence of my wife and boy. And then I told the boy, I said, "Get out of here, in

(Testimony of F. Alberigi.)

the house," and after he said, "I want to talk to me" and he——

Q. You said that to your own boy?

A. Yes, but my wife was present, and he said to me, "The old lady down there, she is very sick and I would like to—we would like to get a will."

He used that expression, "to have a will, but I couldn't convince her, you are the only man, the only person that can talk to her. Wouldn't you please come down." I thought it wasn't out of line to ask her to make a will. I say, "It will cost a little money, you know," and then I said, "You can take a horse to the trough but I can't make him drink," because she is pretty stubborn.

"You try," he said to me and I coming down and I talk to her on occasion.

Q. Where did you have to go to find her? [372]

A. From Sebastopol, five miles north, to San Francisco to Francisco Street down here.

Q. In San Francisco?

A. I came down three times.

Q. Now, did Mrs. Particelli ever stay at your house?

A. Yes, during the period that she asked me to take her to the lawyer. Mrs. Guerrazzi brought her over and sometimes she would stay even two weeks, three weeks, any time with us.

Q. And did she mention that fact when she told you that she wanted to pay you for your services?

A. She said, "I pay you," and I said, "That is

(Testimony of F. Alberigi.)

all right, it is up to you," but we never made really an agreement to pay.

Q. But when she did say that, she wanted to pay you, did she point out to you that she had stayed at your house and she wanted to pay you for that too?

A. I don't think she paid me because she stay at the house. I think she pay me because I was coming to her and brought her to the lawyer and translate the language.

Q. I misunderstood what you told me before.

A. That is the reason.

Mr. Marcussen: That is all.

Mr. Brookes: I have no questions.

The Court: That is all.

(Witness excused.) [373]

Mr. Brookes: May I recall Mrs. Guerrazzi for one question?

The Court: All right.

Whereupon

CLOTILDE GUERRAZZI

was recalled in rebuttal on behalf of the Petitioner and having been previously sworn, testified as follows:

Further Direct Examination

Q. (By Mr. Brookes): Mrs. Guerrazzi, how many children did your mother have?

A. She had one.

Q. Were you it? A. I am.

Mr. Brookes: Thank you.

(Testimony of Clotilde Guerrazi.)

Mr. Marcussen: No questions, thank you.

(Witness excused.) [374]

* * * * *

Friday, May 19, 1950

(Met, pursuant to adjournment, at 9:30 a.m.)

* * * * * [375]

FRED J. FOSTER

was called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Fred J. Foster, 310 Sansome Street, San Francisco.

Q. (By Mr. Brookes): Mr. Foster, what is your occupation, please? A. I am an attorney.

Q. Do you mean an attorney-at-law?

A. Yes, an attorney-at-law.

Q. Are you acquainted with Giulio Particelli?

A. Yes, I am.

Q. Have you ever represented him?

A. Yes.

Q. In what connections? [377]

A. Well, in several connections. I was his attorney for several years, transacting any legal business that he had at the time.

Q. In more than one connection?

A. Yes, in several matters.

Q. Mr. Foster, it is stipulated in this case that in

(Testimony of Fred J. Foster.)

December of 1943, Mr. Particelli sold some wine and a winery known as the Lucca Winery to Tiara Products Company, as the result of entering into an agreement of sale between himself and Mr. John Dumbra. Did you represent Mr. Particelli in that transaction? A. Yes, I did.

Q. Do you have any present recollection of any of the circumstances of that transaction?

A. My memory is a little hazy on it, but, to the best of my knowledge, Mr. Particelli came in to see me, oh, probably a month or so before, or several weeks before the transaction was actually closed and told me that he intended to dispose of all or part of his bulk wine at that time. I advised him of the possibility of there being a ceiling on the wine. I was not too familiar with liquor controls and so on at the time, but I did advise him of the possibility of there being a ceiling on the wine, and in my opinion, if there was such a ceiling, the wine would have to be sold at that price, and for him to keep that in mind in any transaction he might have in [378] selling his bulk wine.

Q. Did you state that was a conversation with Mr. Particelli, as I understood, several weeks before the transaction of the sale between Mr. Particelli and Mr. Dumbra?

A. Yes, that is correct. Mr. Particelli had come to me and told me beforehand that he had anticipated a deal with Dumbra through Mr. Archie Mull.

(Testimony of Fred J. Foster.)

Q. Did you have any further connection with the transaction?

A. Well, until the transaction was almost concluded, I did not. At a later time—and my dates are very vague there—but at a later time Mr. Particelli came to me and told me that there was going to be a meeting over at Arthur Anderson's office and asked me if I would attend, if I would go to the meeting in order that I could prepare the necessary contract in connection with the transaction.

Q. Did you attend that meeting? A. I did.

Q. Do you have any recollection of what occurred at that meeting?

A. Well, yes. I have this recollection, that Mr. Dumbra was present, Mr. Archie Mull and George Oefinger of Arthur Anderson, and Mr. Particelli, and at that time they told me what the intent was as far as the contract was concerned. I made notes at the time as to what the terms of the contract [379] would be, and then I was to go back and prepare the actual agreement and present it to them for signature.

Q. Did you prepare the agreement of sale?

A. I prepared an agreement of sale, yes.

Q. Mr. Foster, I hand you the stipulated Exhibit A-1 entitled Agreement of Sale. I ask you whether you prepared this document?

A. Yes, this document is similar to a copy I have in my file and I am quite sure it is the one I had prepared at the time.

Q. Did that agreement embody the instructions

(Testimony of Fred J. Foster.)

you received as you understood them?

A. Yes, it did.

Mr. Marcussen: Objection to that, Your Honor, and I move the answer be stricken on the ground there is no foundation laid as to what instructions he received.

The Court: Overruled.

Q. (By Mr. Brookes): Mr. Foster, I hand you the stipulated Exhibit E-5. The stipulated Exhibit E-5 is a letter addressed to the Bank of Sonoma County signed by G. Particelli and by Eletta Particelli. Will you examine that, Mr. Foster, and tell the Court whether you prepared the original of that document?

A. What actually took place when this letter was prepared, Mr. Particelli and myself, and I am not sure whether [380] Archie Mull was present or not, but we sat in a conference in the Bank of Sonoma in Sebastopol with the manager of the bank, who was Mr. Hotle. We went over the details of the transaction at that time. Mr. Hotle actually prepared—actually dictated this letter, to the best of my knowledge, and the escrow instructions, and they were signed there—pardon me, Mrs. Particelli was also present at the time, because these instruments were signed in the presence of all of us at that time. In other words, the Bank of Sonoma was acting as escrow agent for the transaction.

Q. And your recollection is, I believe you stated, that Mr. Hotle dictated that letter?

(Testimony of Fred J. Foster.)

A. I am quite sure that he did, yes. That is the best of my recollection.

Q. Mr. Foster, I hand you the stipulated Exhibit F-6, which is a second letter addressed to the Bank of Sonoma County and signed by G. Particelli and Eletta Particelli, and I ask you whether you prepared that document?

A. The same applies to this letter. I am quite sure that Mr. Hotle dictated the letter in my presence and that I approved the same and had the Particellis sign the letter at the time.

Q. Mr. Foster, at the time that you prepared the agreement of sale, did Mr. Particelli tell you what the sale price of the wine was?

A. Yes. [381]

Q. Do you recall what he told you?

A. I recall from looking in my file. Actualy, it was $77,000.

Q. Did Mr. Particelli tell you what the sale price of the winery was? A. Yes.

Q. Do you recall what he told you it was?

A. No, the figure I do not recall, no—two hundred and some odd thousand dollars.

The Court: He asked if he told you.

The Witness: Yes, he did tell me, yes.

Q. (By Mr. Brookes): Do you believe that the figure which he told you is the one which would appear in the agreement of sale which you prepared?

A. Yes.

Mr. Marcussen: Objection to that, if Your Honor please.

(Testimony of Fred J. Foster.)

Mr. Brookes: I will withdraw it and rephrase it, Your Honor.

The Court: Strike that answer.

Q. (By Mr. Brookes): Do you believe that in preparing the agreement of sale you followed the instructions which Mr. Particelli gave you in relation both to the price of the wine and the price of the [382] winery?

Mr. Marcussen: Just a moment. Objection to that, on the ground it calls for his belief and not for what he knows.

The Court: I will overrule it.

The Witness: I did. I did prepare the agreement in accordance with the instructions that were given to me on that day of the meeting.

Mr. Brookes: Thank you. I have no further questions.

Cross Examination

Q. (By Mr. Marcussen): What were the instructions that you received with respect to the preparation of that agreement?

A. Unless I have the agreement to refer to, I will be guessing, but——

Q. In other words, you have no independent recollection now, Mr. Foster, of the instructions you received from Mr. Particelli?

A. Yes, I have an independent recollection to this extent, that I was instructed to prepare an agreement whereby there was to be a sale of a certain number of gallons of bulk wine at a total price, and included in the agreement was to be the

(Testimony of Fred J. Foster.)

sale of the buildings and equipment of the winery at a fixed price.

Q. Well, now, referring to the second conference that you described with Mr. Particelli—strike that, please. [383]

May I ask you, is it your testimony that you had a conference with Mr. Particelli with respect to the sale of his wine some time prior to December of 1943?

A. Yes, a conference to this extent, that Mr. Particelli came to me whenever he sought advice in any of the matters at the time—he came to me prior to the preparation of this agreement and informed me that he intended to sell, or at least that he had an offer to sell some or all of his bulk wine and that was the conference that I referred to.

Q. That was the first conference you had with him about this sale? A. Yes.

Q. Then you had another conference with him?

A. The next conference, to the best of my recollection, was in the office of Arthur Anderson.

Q. How soon after the first conference was that?

A. It would entirely be a guess. I just don't know. I imagine, though, within a few weeks.

Q. Now, in response to counsel's question concerning that conference, you stated that you had refreshed your recollection from your files. What files was the document—what are the documents in your files from which you refreshed your recollection?

A. I have some rough pencil notes that I made

(Testimony of Fred J. Foster.)

at the time of the conference, giving the details of the agreement that [384] I was to prepare. The notes that I have, I have on them the number of gallons that were to be sold, the price that was to be fixed, the selling price, which according to my notes was twenty-eight cents a gallon, the price of the sale of the winery itself, and the things that were to be included in it, and from that I prepared that agreement, a copy of which I have in my files.

Q. Now, is that the same conference—that is the first conference you described?

A. The first actual conference, yes, at Arthur Anderson's.

Q. By actual conference, were there any other conferences, by telephone or anything else, about this transaction?

A. Not to my knowledge, no. I was just distinguishing between Mr. Particelli seeking advice from me originally and the conference at Arthur Anderson's.

Q. At the time he sought advice from you originally, was anything mentioned in that conference about the possibility that Mr. Particelli would sell his winery? A. Not to my knowledge.

Q. To your best recollection?

A. To my best recollection, there was no reference to the winery at the time.

Q. You wouldn't say that he did not mention it, would you?

A. No, I wouldn't say that he did not mention

(Testimony of Fred J. Foster.)

it, but to [385] the best of my recollection he did not mention it.

Q. Then you are not certain that he did not mention the possibility of selling the winery with the wine?

A. Well, it is very difficult to answer any question positively, because my memory fails me at times, now. To the best of my recollection the only discussion at that time was with reference to the sale of bulk wine, and that is the only way I could answer that truthfully.

Q. And you are not prepared to say, however, that he did not bring up the question of the sale of the winery with the wine?

A. I would not make such a definite statement on any question you would ask me, directly.

Q. Well, I notice you made very definite statements to Counsel here about the wine.

A. Things I am sure of, yes.

Q. Do you have those notes with you?

A. No, I didn't bring them. They are easily obtainable, however.

Q. What advice did you give him about ceilings?

A. I simply warned him at the time there was a ceiling, to the best of my knowledge, on wines or liquor products of that kind, it should be checked carefully, and in my opinion he would have to follow whatever the ceiling was in making any sales. [386]

(Testimony of Fred J. Foster.)

Q. You didn't purport to advise him what the ceiling would be?

A. I did not at that time, no.

Q. Did you have any knowledge at that time that the sale of a winery—I beg your pardon—the sale of wine in connection with the sale of a winery itself was or was not subject to OPA price regulations?

A. I didn't quite understand that.

Q. I will rephrase the question, then. That was not very clear.

Did you know at the time that Mr. Particelli talked to you whether OPA price regulations applied to the sale of an inventory of wine in connection with the sale of an entire winery?

A. No, I did not know that. I did not purport to know it either, because I was not familiar with that phase of the law.

Q. Did you check into that matter later?

A. No.

Q. You didn't purport to advise him at all as to what his ceiling might be; all you knew was the OPA was in existence and he had better check, is that correct?

A. That is absolutely right, yes.

Q. Now, when did you last talk with Mr. Particelli?

A. Oh, other than just a moment ago when I came into the hall here, I haven't talked to him for several years, to the [387] best of my knowledge.

(Testimony of Fred J. Foster.)

Q. Yes, and did you discuss this case with Counsel before you came here, about the matters that you were to testify to?

A. I discussed the case generally with Counsel, but not as to the matters I was to testify to, no.

Q. Did he tell you what the issue was in this case?

A. Yes, I asked him what the issue was in this case.

Q. Did he explain to you anything about the government's contention and the petitioner's contention in this case?

A. I don't know that he did in so many words, but, as I said, I asked him what the issue was in order that I would know myself.

Q. Now, when the sale was consummated, did you handle the business details for Mr. Particelli?

A. The extent of any business details I handled was closing the escrow with the Bank of Sonoma.

Q. Yes, and did you also perform any services for Mr. Particelli with respect to the reimbursement to him of any funds he may have expended on behalf of Tiara Products Company after the sale?

A. No, I don't believe I did. I am a little bit vague in my recollection as to whether I distributed any of the proceeds that were received from the sale, but I rather doubt that I did, inasmuch as the Bank of Sonoma was the escrow agent. [388]

Q. Do you know whether after the sale Mr. Particelli stayed at the premises and performed

(Testimony of Fred J. Foster.)

services for Tiara, do you remember that?

A. I am very vague on my remembrance there.

Q. Did you ever see any remittance from Tiara Products Company or their representative, Mr. Mull, as reimbursement to Mr. Particelli for services that he performed for Tiara?

A. I just don't remember and there was nothing in my file that referred to it, so I don't know.

Q. Did you ever send or remit any moneys to Mr. Particelli at all?

A. I have a very dim recollection that I might have remitted moneys to him, yes. That I could ascertain very easily from my checks, however.

Q. I hand you Respondent's Exhibit N in this proceeding, which purports to be a letter from Mr. Mull of Tiara Products Company, dated July 11, 1944, and ask you to read the second paragraph of that letter.

A. I am sure that that is correct.

Q. Does it refresh your recollection?

A. Somewhat, yes. I have a vague recollection of the transaction there, where I remitted money to Mr. Particelli.

Q. Do you remember that check of $500?

A. Vaguely.

Q. Now, do you remember in your conversations with Mr. Particelli referring to any figure of $350,000? [389]

A. The first time that I heard that figure was when I was instructed to prepare the agreement

(Testimony of Fred J. Foster.)

covering the total of $350,000 for the sale of the wine and the winery.

Q. Yes, and were you informed then by them, by Mr. Particelli rather, that he had sold his winery and wine for $350,000?

A. My notes indicate that there was a sale of wine, and the wine——

Q. I asked you whether you have any recollection of whether Mr. Particelli told you that he sold his wine and winery for $350,000?

A. I do not have a recollection of his saying that he sold his wine and winery for $350,000.

Q. Not even after having refreshed your recollection by conferences with petitioner's counsel and reference to your letter and file?

A. No, I do not have such a recollection.

Q. Would it be your conclusion that Mr. Particelli did make such a statement, referring particularly to the phraseology of Exhibit A-1 in this proceeding?

A. No, I do not believe that he made such a statement, because, as I mentioned, in refreshing my memory from my notes I definitely have in my notes the segregation of the wine and the winery, and there is no indication of combined sale to my knowledge at all. [390]

Q. Why didn't you prepare separate agreements of sale?

A. Mostly because I was instructed to prepare it this way, I presume.

Mr. Marcussen: Thank you. That is all.

(Testimony of Fred J. Foster.)

Mr. Brookes: No further questions.

The Court: That is all, Mr. Foster.

(Witness excused.)

The Court: That is your last witness?

Mr. Brookes: Yes, your Honor, except of course as more will appear by deposition.

The Court: Respondent may proceed with his case.

Mr. Marcussen: I call Mr. Gomberg, please.

Whereupon,

LOUIS R. GOMBERG

was called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Louis R. Gomberg.

Q. (By Mr. Marcussen): What is your age, Mr. Gomberg? A. Forty-three.

Q. What is your present business?

A. I am a wine industry consultant.

Q. And do you have your own office? [391]

A. I do.

Q. And will you describe what you do as a wine industry consultant?

A. I perform services for members of the wine industry and for people outside of the wine industry having wine industry business. Those services consist of information and guidance in connection

(Testimony of Louis R. Gomberg.)

with industry marketing problems, research, economics, statistics, Federal regulations pertaining to wine industry operations and various other services.

Q. How long have you been in that business?

A. A little over two years.

Q. What were you doing prior to that?

A. Prior to that time I was Research Director of Wine Institute.

Q. And how long were you with the Wine Institute? A. Approximately twelve years.

Q. From when, beginning when?

A. From 1936 to 1948.

Q. And what were your duties at the Wine Institute as research director?

Mr. Brookes: Your Honor, I object. I don't recall the witness stating that he was Research Director. Perhaps he was about to, had he been asked, but so far only Counsel has testified he was research director.

Mr. Marcussen: I think the record shows the witness [392] did so testify.

The Court: Were you research director?

The Witness: Yes, your Honor. May I have the question again?

(Question read.)

The Witness: My duties covered a wide field of operation, ranging from liaison services between the management of Wine Institute——

Q. (By Mr. Marcussen): Between what?

A. Between management of Wine Institute and

(Testimony of Louis R. Gomberg.)

counsel for Wine Institute, assistance to the management in connection with the preparation of industry economic studies, the actual preparation of the wine industry bulletins, known as Wine Institute Bulletins, the handling of correspondence relating to a wide variety of wine industry problems.

Q. With whom, correspondence with whom?

A. With members of the industry, governmental agencies and others, in the fields of economics and statistics, Federal regulations, state regulations, technological problems of the industry, and many other phases.

Q. Were you consulted by them with respect to marketing problems? A. Yes.

Q. Now, prior to 1936, what did you do? [393]

A. Prior to 1936, I was the City Editor of the Associated Press in San Francisco.

Q. How long were you in this newspaper work immediately prior to your connection with Wine Institute? A. For three years.

Q. That gets back to 1933; what did you do prior to that? A. I practiced law.

Q. Where? A. Ann Arbor, Michigan.

Q. And will you state the extent of your education, please?

A. How far back do you wish me to go?

Q. Well, just beginning with the last education you received, and I will stop you when you go back too far.

A. The last education was a Bachelor of Law Degree at the University of Michigan in 1931.

(Testimony of Louis R. Gomberg.)

Q. And where did you go to college?

A. The University of Michigan, received my Bachelor of Arts Degree in 1928.

Q. Where did you receive your earlier education?

A. At Duluth Central High School in Duluth, Minnesota.

Q. Now, as the result of your experience with the wine industry, in the capacities you have mentioned——

Mr. Brookes: Your Honor, may I object to the [394] qualification of the witness. There is a particular in which counsel can—well, there is a deficiency which counsel can remedy. I don't believe the Court can take judicial notice of what the Wine Institute is. Its name suggests it is the wine institute, that it has something to do with wine. I shall press my objection unless counsel prefers to identify the function and activities of the Wine Institute.

Mr. Marcussen: I will do that.

Q. (By Mr. Marcussen): Will you please state the function of the Wine Institute and describe the organization generally?

A. Yes. The Wine Institute is the trade and service organization for the wine industry of California, and the wine industry of California constitutes approximately ninety per cent of the wine industry of the United States.

Q. When you say "wine industry" what members of the industry do you refer to, and what classification—producers?

(Testimony of Louis R. Gomberg.)

A. Producers of wine primarily, yes.

Q. Are there any other members?

A. Yes, there are a few members who produce only brandy.

Q. Are there any bottlers in the association?

A. Not as bottlers, but as producers who also bottle wine.

Q. Yes, and will you state for the Court approximately how many wineries, if you know, were in the State of California [395] in the year 1943?

A. In the neighborhood of 400.

Q. Now, in connection with your experience in the wine industry and as a consultant to the wine industry since that time, have you become familiar with general business conditions and economic conditions in that industry over a period of time? That is the end of my question.

A. Yes, I have.

Q. How far back?

A. My personal experience extends back to 1936, when I first became associated with Wine Institute. My research experience dates back, well, to the origin of wine production in California, and even before, of course.

Q. By origin, what year do you refer to?

A. In California?

Q. Yes. A. During the 19th Century.

Q. Well, I don't want to back into all that. I was referring particularly to whether or not you had occasion to become familiar with economic conditions in the industry beginning with its rebirth

(Testimony of Louis R. Gomberg.)

after the repeal of the 18th Amendment?

A. Yes, I have.

Q. That was the year 1933 or 1934?

A. Prohibition was repealed in December, 1933.

Q. And I think you said you had occasion, did you, to [396] review the history of the industry generally in the State of California?

A. Yes, but more than generally. It became part of my official duties at the Wine Institute to have intimate knowledge of the operations of the industry, both at the time I entered it and subsequently and also prior to the time I entered it.

Mr. Brookes: Counsel, I will stipulate that when you asked about the rebirth of the 18th Amendment you meant something else.

Mr. Marcussen: Thank you very much, Counsel. I might have been mistaken. I should say repeal, rebirth of the industry after repeal.

Q. (By Mr. Marcussen): Now, will you state generally what business conditions were in the wine industry prior to the World War?

A. The most recent World War?

Q. The most recent World War, particularly with respect to the demand for wine and marketing problems at the time.

A. When the wine industry was reborn in 1934, or specifically at the end of 1933, with the onset of repeal it was almost immediately confronted with surpluses. There was a surplus, first, in 1934 when the first demand for wine following repeal subsided, and that was followed by what might be

(Testimony of Louis R. Gomberg.)

described as continuing surpluses through the entire period from 1934 to 1941. The reason, the primary reason for those [397] continuing surpluses was the excess production of grapes, and because of the peculiar conditions prevailing in the wine industry and grape industry of California surplus grapes invariably, almost invariably, have found a home, so to speak, in the wine industry, causing the production of wine to exceed in most of the years referred to the demand for wine.

Q. By the way, what are the various types of grapes grown and how are they disposed of on the market, what channels do they go into?

A. Well, there are three broad classes of grapes used in the wine industry and grape industry of California. The names are not entirely accurate, but for whatever purposes they might have in this connection, they are wine variety grapes, table variety grapes, and raisin variety grapes.

Q. What are table variety grapes?

A. Table variety grapes are those varieties of grapes which are consumed as fresh fruit, like Tokay, and Malagas, and Ribiers, and other such varieties.

Q. Are they also used for wine?

A. They can be used for wine, and more often than not, they are also used for wine, yes.

Q. And what about the raisin variety grapes?

A. Raisin variety grapes consist primarily of the popular variety known as Thompson seedless. They are the little green grapes you buy in the

(Testimony of Louis R. Gomberg.)

fresh fruit markets. Although they are [398] designated as raisin variety grapes, for statistical purposes by the University of California and the Federal and State Departments of Agriculture, in some years the greater part of the production of Thompson seedless grapes goes into wine and table fruit rather than into raisins, but they are, nevertheless, classified as raisin variety grapes. Lesser known varieties of raisin variety grapes are the Muscats, which are also used as fresh fruit, and also go into wine, and the Sultanas, and the Zante currants. Those are the four varieties of raisin variety grapes grown in California.

Q. What are the wine variety grapes?

A. The wine variety grapes are by far the larger category, by variety, by sub-variety, or perhaps one should say genus and species to be more precise. They constitute by far the largest classification of species of grapes and range all the way from what might be described as very common wine varieties, like the Alicantes and the Corignans to the very choicest wine variety grapes, such as the Pinot Noir and the Sauvignon-Cabernet.

Q. Well, there are various others?

A. There are literally hundreds of varieties of wine variety grapes.

Q. Now, with respect to wine variety grapes, are they edible grapes or suitable for marketing as edible grapes?

A. They are edible in the broad sense. They are not normally or customarily sold as fresh eating

(Testimony of Louis R. Gomberg.)

grapes, if that is [399] what you mean.

Q. Can you describe the grape itself?

A. Most wine variety grapes, not all but most of them, are very tiny in size, and have relatively coarse skins, and are expensive to grow.

Q. You wouldn't go out of your way to eat them, would you?

A. Perhaps that question can best be answered by saying for various reasons, both economic and vintacultural, wine variety grapes are not commonly found in the fresh fruit markets.

Q. Yes. Now referring to economic conditions, beginning with 1941 and continuing through the year 1945, will you describe those conditions as briefly and generally as you can, particularly with respect to the demand for wine?

A. Yes. With the onset of the approach of war, in 1941—this is before war was actually declared—it began to appear that if war came the demand for wine could be expected to increase. There was also talk in that year of 1941 about the possibility of the government taking over all or a substantial portion of the so-called raisin variety grapes for use to feed the armed services in the event armed conflict occurred, and also to assist in feeding allied nations in the event we entered the war. However, that talk had not materially affected markets for grapes or the market for wine in 1941. It did cause an increase in the price of grapes and a slight increase in the [400] price of wine, toward the latter part of that year and the early part of 1942. Then,

(Testimony of Louis R. Gomberg.)

after war was declared, in December of 1941, there was a severe readjustment in the making in the wine industry, as well as, of course, in practically every other industry.

Q. Did demand increase?

A. Demand shot upward the latter part of 1941 and continued very high during 1942. In fact, 1942 represented up to that time the largest volume year for California wine in the history. As I recall it, the figure was about 96 million gallons. Prior to that time the peak was in 1941, when about 89 million gallons of California wine entered consumption channels. The demand for wine increased, at least the intensity of the demand increased, in 1942, continued through 1943 and 1944. In 1945 there was a period of about four or five months when the demand slackened because of price uncertainties in the wine industry, which I can describe if you wish.

Q. I don't ask you to go into that at the present time.

A. Then picked up again in the latter part of '45 and reached an all-time record high in 1946. 1946 still stands as the peak year of all years in the consumption of wine, or at least in the movement of wine from wineries into consumption channels in the United States.

Q. What was the cause of this great increase in the demand of wine, if you know? [401]

A. Well, I would attribute the high demand dur-

(Testimony of Louis R. Gomberg.)

ing this period, first, to the scarcity of distilled spirits and malt beverages.

Q. Malt beverages, you say?

A. Beer. I think that the storage—or the scarcity of distilled spirits, which included liquor, brandy and other distilled beverages, and beer, was perhaps the most important reason for the intensity of the demand for wine. Other reasons were, of course, the fact that alcoholic beverages serve, I believe, some therapeutic or quasi-therapeutic purpose to relieve tensions, tensions at that time being caused by the war. There was also—I should add there was also a continuing increase in the demand for wine which began with the repeal of prohibition, with the first year, but to explain just very briefly why that increase in demand year after year, beginning with 1934, did not produce happy economic results, it must be kept in mind that even with the increased demand for wine through those pre-war years, the production of grapes managed to keep ahead of the increased consumption for wine, so that the surplus condition I described a while ago prevailed in spite of that increased demand for wine, but during the war years the demand for wine reached proportions which to the best of my knowledge, except perhaps for about a few months after the repeal of prohibition, and except perhaps for a short period just before prohibition was enacted in 1919, effective in January, [402] 1920, have never been approached in

(Testimony of Louis R. Gomberg.)

the history of the wine industry, of, at least, California.

Q. Would you attribute any of this increase during the war in the demand for wine to economic conditions generally?

A. Well, that goes without saying. I think the expendable income of the consumer during the war period was, I believe, commonly recognized to be greater than it had been at any time prior to that time. At least, in recent years. Yes, there was a great deal of available or expendable consumer income for wine.

Q. During that time, did the government issue any orders with respect to the raisin crop and grapes available for the raisin production?

A. Yes. Yes, in 1942 the government issued what was known as a war food order. I believe the number—I am not certain of it—was 16. It was either 16 or 17. In fact, there were two war food orders, one controlling the disposition of the fresh raisin variety grapes and one controlling the disposition of the dried grapes. One was 16 and one was 17.

Q. Don't go into detail about that.

A. The net effect of those orders was to curtail sharply the quantity of grapes available for crushing by wineries. Now, to understand the significance of that, I should explain that prior to 1942 the wine industry, the wine branch of the grape, raisin and wine industries of California, had crushed an average [403] of between three and four hundred thousand tons of raisin variety grapes per

(Testimony of Louis R. Gomberg.)

year, and when the government war orders to which I alluded a moment ago were promulgated, that, for practical purposes, reduced the available supply of grapes for crushing by that three to four hundred thousand tons a year, and that intensified the scarcity of wine in relation to this extremely high demand for wine that developed during the war.

Q. Yes. Now, during the time that you were with the Wine Institute, during these war years, will you state to the Court what your duties were with regard to the dissemination of information to members of the industry concerning OPA publications and rulings and regulations; did that fall within the scope of your work? A. Yes, it did.

Q. And did you become thoroughly familiar with those rules and regulations?

A. Yes. I would say that I did.

Q. During that time. Can you state when the price control statute was passed by Congress—do you know?

A. I am quite sure I do. I think it was January of 1942. That was the Emergency Price Control Act of 1942.

Q. Yes, and when was it effective?

A. Effective immediately. It was a war measure, as I recall it. My recollection is pretty clear because I——

Q. And will you go on with that? [404]

A. I was just saying, my recollection of that is pretty clear because immediately upon the enact-

(Testimony of Louis R. Gomberg.)

ment of that statute it became my responsibility to investigate the statute's implications with respect to wine industry operations, and I ascertained at that time that although the statute embraced wine not by name but by not excluding it from its scope, that it would be necessary to watch out for the possible application of that statute to wine prices.

Q. Yes.

A. I might add in that connection that the first regulation under the Emergency Price Control Act of 1942 that applied to wine prices was the General Maximum Price Regulation, which came out in May, as I recall it, May of 1942, and it froze the General Maximum Price Regulation, issued pursuant to the Emergency Price Control Act of 1942, froze wine prices as of March, 1942. The GMPR, short for General Maximum Price Regulation, was issued in May, freezing prices as of the highest levels charged for the particular item, or at which the particular item was offered for sale if there were no sales, in March of 1942.

Q. Now, were there any amendments and supplementary orders issued by the OPA—regulations?

A. Pertaining to wine, you mean?

Q. Pertaining to wine, yes.

A. Yes, there were. [405]

Q. What was the first of those, if you recall?

A. The first regulation pertaining to wine was Amendment No. 54 to Supplementary Regulation No. 14 of the General Maximum Price Regulation. That was issued on November 1, I believe it was.

(Testimony of Louis R. Gomberg.)

I am quite certain it was November 1, 1942.

Q. And was that the first one specifically applying to the wine industry? A. It was.

Q. And what was the interrelationship, if any, between that regulation and the General Maximum Price Regulation?

A. May I ask you what you mean by interrelationship?

Q. Well, which controlled the wine industry; did both of them control the wine industry, did one of them, and, if so, which one?

A. The amendment to which I referred, Amendment No. 54 to Supplementary Regulation No. 14 was itself an amendment to the General Maximum Price Regulation, and as such there was a provision, as I recall it, in the General Maximum Price Regulation to the effect that—perhaps I should put it the other way; that Amendment 54 pertained specifically to wine, but in all respects in which wine was not specifically covered by Amendment 54 to Supplementary Regulation 14, the general provisions applicable to all commodities covered by that regulation would apply.

Q. Now, referring to Amendment No. 14, in general what [406] ceilings did it establish for the wine industry, particularly with respect to dry wines? A. With respect to dry wines?

Q. Yes.

A. Amendment No. 54 established a base ceiling of 21½ cents per gallon for dry wine. To that 21½ cent ceiling could be added an amount trans-

(Testimony of Louis R. Gomberg.)

lated from a maximum of $8.30 a ton for grapes which——

Q. Do you mean an increase in the price of grapes?

A. Yes. To that 21½ cents could be added an amount developed by a somewhat complicated formula, the net effect of which was to permit an amount to be added to that 21½ cents up to an amount of about 6 cents a gallon, which would bring the total then to about 27½, maybe a little over, cents per gallon maximum. Now, that was the maximum which the winery was permitted to charge under that regulation.

Q. And are they commonly called permitted increases?

A. Yes, the amount up to about 6 cents per gallon was known as the permitted increase.

Q. What were they based upon?

A. Permitted increases were based upon the amount paid for grapes, for crushing by the particular vintner in 1942 over and above the amount paid in 1941, up to, but not exceeding, $28.20 per ton.

Q. Now, was it necessary for all wineries to adopt that [407] flat ceiling, plus the permitted increases, or were there other ceilings for other wineries prevailing at that time?

A. Under that regulation there were two. Generally speaking—there were minor exceptions, but generally there were two types of ceilings available to the wineries: one was the so-called flat ceiling

(Testimony of Louis R. Gomberg.)

plus permitted increases, to which I have referred; the other was the so-called March, 1942, ceiling. That meant, of course, the highest price charged by the particular vintner in March of 1942, or if he didn't make a sale, then the highest asking price, bonafide asking price, in March, 1942. Naturally, the March, 1942, price would be used only where it exceeded the maximum price developed by the formula to which I referred a moment ago.

Q. In other words, a winery could either have this flat ceiling, plus permitted increase, if its ceilings as based upon the March, 1942, levels were below those per that flat ceiling and permitted increases, or if his March, 1942, ceilings were higher, he could still use those higher ceilings, is that not true?

A. That is correct. To his March, 1942, he could add—by the same formula applicable to the so-called flat ceiling he could add an amount representing—translated from grapes into wine—the increased amount that he paid for grapes up to $8.30 a ton in the 1942 crush.

Q. Yes. Now what was the next general regulation with [408] respect to the wine industry?

A. The next regulation was Amendment No. 14 to the——

Q. I wasn't referring to that, I was referring to the general one. Was there one in October, 1943?

A. Oh, yes, yes. That was Maximum Price Regulation No. 445, Amendment No. 3, Maximum Price

(Testimony of Louis R. Gomberg.)

Regulation—what can be referred to as MPR 445, No. 3.

Q. State generally, in general terms, the provisions of that regulation.

A. That regulation was promulgated on the 1st of October, 1943, and was effective as to wine industry services on October 7, 1943, and as to wine and other goods, commodities covered by the orders, effective on October 22nd, 1943. That regulation made a number of important changes in the wine price ceilings. It changed the so-called flat ceilings in a number of particulars. It included for the first time so-called flat ceilings for bottled wines. Up to that time there were no flat ceiling for bottled wine, just for bulk wine.

Q. By the way, all the ceilings you have been referring to heretofore applied to the sale of wine in bulk, is that correct? A. Well,——

Q. I mean in so far as you have mentioned the figure of 21 cents——

A. When I alluded to the March, 1942, ceilings that [409] applied to either bulk wine or bottled wine.

Q. Yes.

A. Amendment 3 to MPR 445 also, for the first time, established special ceilings for a number of services connected with the production of wine.

Q. What services are you referring to?

A. The services of converting grapes into wine, the service of finishing wine.

(Testimony of Louis R. Gomberg.)

Q. What was the ceiling established for finishing wine?

A. The ceiling established for finishing dry table wine—did you wish dry table wine?

Q. Yes.

A. ——was 2½ cents per gallon.

Q. What was the extent of the services embraced in that finishing of wine?

A. The extent of the services embraced was the operations of finishing, starting with the racking of wine——

Q. I don't mean to go into a description at this time of all the process of finishing the wine, but services over how long a period in the finishing of wine?

A. Well, it included all operations following the completion of the conversion of the grapes into wine, included all operations from that point.

Q. That is, from the crushing?

A. Yes, crushing, the conversion of the grapes into wine, [410] crushing, all of the operations from that point up to the point where the wine would be ready for bottling or for shipment to the bottler, if it was not to be bottled by the person producing it.

Q. Did it include storage?

A. Yes, I was going to say it included storage in the winery for a period not to exceed 180 days.

Q. Now, will you describe generally, or rather give a comparison of the ceilings established by the OPA for case goods and for bulk goods; by

(Testimony of Louis R. Gomberg.)

that I take it that case goods is the bottled product, and bulk goods being wine that is not bottled.

A. I assume your question pertains still to that Maximum Price Regulation 445, Amendment 3, that became effective in October, 1943, is that what you referred to?

Q. No—Well, I will ask you to state it, whatever the information is.

A. Well, under the original regulation applicable specifically to the wine industry, that is, Amendment 54 to Supplementary Regulation 14, issued in November, 1942, there was no prescribed or established relationship between maximum prices for bulk wine and maximum prices for bottled wine; that is, no established relationship as was done in the regulation of October, 1943; in Amendment 54 to which I alluded, the only so-called flat price established was for bulk wine. There were [411] no flat prices for bottled wine.

Q. Which amendment was that?

A. Amendment No. 54 to Supplementary Regulation No. 14. It was a rather crude regulation, if you will, in that the OPA had not yet had enough experience, nor had the industry, to retain all the elements, and rather complex elements, of wine production and distribution.

Q. By the way, in connection with your duties at that time with the Wine Institute, were you at any time a consultant to the OPA?

A. Yes, I was.

Q. When was that? A. In 1943.

(Testimony of Louis R. Gomberg.)

Q. What part of 1943, if you remember?

A. As I recall, it was about December of 1943.

Q. And how long did you function in that capacity?

A. Until the termination of OPA, in 1945.

Q. And what were your duties in connection with that?

A. I provided information and assistance to the Office of Price Administration with respect to wine industry production and marketing practices. I provided information with respect to wine industry statistics and also with respect to economic conditions in the industry, and information relating to particular operations, so that the OPA, for example, could ascertain in advance perhaps more effectively than otherwise just how the [412] proposed regulation might affect—apply to individual types of operations within the industry.

Q. Your services, of course, were provided to the OPA by the Wine Institute?

A. That is correct.

Q. Were you compensated for that?

A. No, I was not.

Q. Was there any reciprocal relationship between the OPA and the Wine Institute with respect to your services?

A. I am not clear what you mean by reciprocal relationship.

Q. I am talking now about information provided by the OPA to the Wine Institute.

A. Well, there was a stipulation in the informal

(Testimony of Louis R. Gomberg.)

arrangement entered into between the Wine Institute and the OPA, early in the days of OPA, that the information furnished to the Wine Institute would in turn be made available by the Wine Institute to the industry, although it was not necessary a person be a member of the Wine Institute to obtain that information.

Q. How was that information disseminated in the industry?

A. It was disseminated in the form of bulletins, weekly or sometimes as often as two or three times a week, depending upon the speed with which the information had to be transmitted to the industry; sometimes perhaps once in two weeks.

Q. That is, in a formal way? [413]

A. In a written way. In addition to that, it was my responsibility in the wine industry to keep individual industry members informed regarding developments in connection with the Office of Price Administration, and of course other governmental agencies during the war, and peacetime agencies that functioned during the war.

Q. Who prepared the wine bulletins?

A. I did.

Q. Over how long a period of time?

A. About eleven years.

Q. Beginning with 1936?

A. No, I started preparing the bulletins in 1937, and until my departure from the Institute in 1948.

Q. How long was your mailing list in 1942 and 1943?

(Testimony of Louis R. Gomberg.)

A. I could only approximate that. It was not my specific job to check on numbers of the mailing list, but I do recall from time to time having talked to the chief mailing clerk about it, and it would be my best estimate at that time it was around 2,000 or 2,500.

Q. And the mailing list included other members of the wine industry generally, in addition to producers?

A. It could and can and does and did.

Q. Well, I assume it must have if there were only 400 producers. Refreshing your recollection on that, who are these other people? [414]

A. Did you say other than producers?

Q. Yes.

A. Oh, yes, the mailing list included state and federal governmental agencies, of course, members of the bottling trade, university officials, and many people in many walks of life, either directly or indirectly related to the wine industry.

Q. Yes. Now, I want to go back to the question I previously asked concerning the general relationship between the ceilings for case goods and for bulk goods.

A. Well, as I explained, there were no so-called flat ceilings for case goods established in Amendment No. 54 in November of 1942, so that the relationship existing at that time was not prescribed by OPA, except indirectly, in connection with the March, 1942, ceilings for case goods or bulk, as the case might be, and the so-called flat ceilings

(Testimony of Louis R. Gomberg.)

that were established for wines, for which no March, 1942, ceiling more favorable in amount than the so-called flat ceilings, was available; in Amendment No. 3 to MPR 445, effective in October, 1943, the Office of Price Administration came out with flat ceilings for both bulk and case goods. Now, the relationship was substantially as follows: the bulk ceilings recognized two classes of wine, current wines and non-current wines. The ceilings for red and white current wines were 28c per gallon for red and 33c per gallon for white. [415]

Q. And again I want to ask you, if anybody had a higher March, 1942, ceiling they could still use it, couldn't they?

A. Yes. The ceilings for non-current red and white wines were 40c per gallon for red and 45c a gallon for white.

Q. Did you define what current wine was?

A. I was about to do that, Mr. Marcussen. Perhaps the best way to do that is to take ourselves back to October, 1943. The regulation prescribed by definition that any wines produced in the 1942 or 1943 selling vintage seasons were automatically classified as current wines; any wines produced prior to 1942 were automatically classed as non-current wines. Now, it was permissible, under the definitions to which I referred, to blend wines of two or more of those years, and if at least 51 per cent of the blended wines consisted of wines produced in 1941 or earlier, even though 49 per cent

(Testimony of Louis R. Gomberg.)

in the blend were 1942 wine or 1943 wine, it was still non-current wine.

Q. Subject to the higher ceilings?

A. Subject to the higher ceilings to which I referred a moment ago. Now, in addition to the bulk ceilings, case goods ceilings, bottled wine ceilings also were established for the first time.

Q. That is, the flat ceilings?

A. Flat ceilings, and there was a marked disparity in the return to the wineries for the wine as between the flat bulk ceilings and the flat bottled ceilings. [416]

Q. How were the bottled ceilings arrived at?

A. The bottled ceilings were arrived at by taking the flat ceilings for the bulk wine and then adding to those ceilings certain elements of cost, including the bottles, cartons or cases, labels, caps, corks, cello-seals——

Q. I don't mean to go into all that detail unless you think it is necessary, Mr. Gomberg.

A. Well, I am merely indicating that in addition to the bulk ceilings the OPA allowed certain elements of cost entering into the marketing of wine as bottled wine, as distinguished from the marketing of wine as bulk wine; selling and administration costs were also included in the case goods ceilings and an element of profit of approximately twice the amount percentage-wise was allowed for bottled wine and also entered into the ceiling price. The reason for twice the amount, as I recall it, the OPA figured a person who markets

(Testimony of Louis R. Gomberg.)

wine in bottled form is entitled, because he is taking a greater risk—under normal conditions he is entitled to a higher relative margin of profit than a man who just sells a tank car of bulk wine.

Q. Yes. And were there included in that any estimated costs instead of actual costs which had been incurred by the bottling industry at that time.

A. There were. There were elements of cost based largely upon representations by the industry.

Q. You are referring to what part of the industry? [417]

A. Well, naturally, it was that part of the industry that was particularly interested in the sale of wine in bottled form, because the man who sold only bulk naturally wasn't concerned in this particular problem directly. He was indirectly, of course, but directly the OPA looked to the man who sold wine in bottled form for information and guidance in building up the total ceilings for the bottled wine.

Q. Was there a committee that provided information to the OPA concerning these statistics?

A. There was.

Q. Do you know generally the composition of that committee?

A. I recall most of them, yes.

Q. How many were on the committee, approximately?

A. My recollection is there were nine members of that committee.

Q. And where did most of them come from,

(Testimony of Louis R. Gomberg.)

what particular segment of the industry were they affiliated with?

A. There were seven, I believe, from California, one from New York——

Q. I don't mean geographically, I mean segments of the industry; that is, between producers and bottlers?

A. The only bottler that I recall who ever served on that committee was a party from outside of California, from Pennsylvania. [418]

Q. The only bottler, you say?

A. The only bottler, as such.

Q. Now, with respect to the others, were they producers? A. They were all producers.

Q. And did those producers also bottle a substantial portion of their products?

A. At what time?

Q. At that time.

A. Yes, I would say that they bottled either all of it or substantially all of it; either themselves or indirectly through branches, affiliates and associates.

Q. And so far as you know, there was only one member of the committee who was a producer of wine alone and had no bottling facilities?

A. No, I didn't say that, Mr. Marcussen. I said there was one member of that committee who was a bottler. He was not himself a producer.

Q. I see.

A. I don't recall anyone on that committee, I don't recall anyone who was strictly a producer

(Testimony of Louis R. Gomberg.)

and seller of bulk wines only. I don't recall that. I am pretty sure there was no one on it.

Q. Now, prior to the war, can you tell the court approximately what percentage of the wine was sold by producers as bulk wine and what percentage was sold in case goods, by the [419] wineries themselves?

A. Are you speaking of California wine?

Q. Yes.

A. Yes. In my opinion, based upon a number of surveys made from time to time over the years—the exact figure has never been ascertained and would not have been possible to ascertain except by an exhaustive examination of the books and records of each individual winery. That was never done, to the best of my knowledge, but approximations were possible and my recollection is about 80 per cent of all the wine sold by California wineries, prior to the war, say, up to about 1940 or 1941, was sold by the wineries in bulk.

Q. Now, beginning with the latter half, latter quarter or latter part, shall we say, of 1943 and thereafter, can you state approximately what percentages of wine were sold in bulk form and what percentage was sold in case goods form?

A. I should like to point out two things in that connection before I answer your question, if I may.

Q. Very well.

A. It is important to bear in mind not everything in the wine industry that is sold in bulk is shipped in bulk, or vice versa; in other words, wine

(Testimony of Louis R. Gomberg.)

may be shipped in bulk but sold as case goods, or it might be sold as case goods and shipped in bulk. That is one point to bear in mind.

Q. Well, I am not thinking now of technical shipments [420] in actual transportation of wine. I am thinking of sales in wine, in connection with what the actual contract would be between the producer and the party to whom he sold.

A. Between 1942 and in the period from 1942 to 1943, a remarkable transition occurred. I mentioned a moment ago it is my opinion about 80 per cent of all the California wines sold prior to 1942 were sold and shipped in bulk, but during that transition period, with the scarcity of wine growing more acute practically day by day, less and less wine began to be sold in bulk. That was especially true in the summer and fall of 1942, in anticipation of the first special OPA regulation governing wine ceilings. When the ceilings came out in November of 1942, the first ceiling, there were some sales in bulk, because prior to that time—let me give, if I may, dessert wine as an example, because it is by far the most common form of wine sold in California. Dessert wine, or sweet wine. The highest price that was charged under the May freeze of the OPA regulations was about 32c a gallon for most, not all, but most, of the sweet wines.

Q. In bulk.

A. In bulk, and under the first amendment governing wine ceilings in November, 1942, the OPA regulations, per formula mentioned a moment ago,

(Testimony of Louis R. Gomberg.)

allowed the price to go up to 51 and a fraction cents per gallon. It was 39 cents plus a maximum increase permitted of just double the amount of dry wine, because [421] it takes two gallons of dry wine to make one gallon of sweet wine. The maximum price that could be charged under that amendment in 1942 was 51 and 2/10 cents, I think, but that was substantially higher than the 32 cents which was for most people the maximum price they could charge between May of 1942 and November of 1942, so the result of that was to allow some wine to move in bulk and into the channels of trade.

Q. You mean as far as sweet wine is concerned?

A. Yes, and dry wine too because the frozen price previously on dry wine was a net retail of 17 and a half cents. It wasn't exactly correct, but that was what OPA announced that it was, and the maximum that could be charged under this governing regulation was 28 cents, a fraction under, but approximately 28 cents. However, on November 15th or 20th, approximately, the OPA announced——

Q. What year?

A. 1942. The OPA announced, effective November 25th if my recollection is correct, there would be no ceilings on unfinished bulk wine sold interwinery, within the state of production. As the result of that, considerable quantities of wine, bulk red wine, white wine and sweet wine, moved interwinery between that date, between November 25th, 1942, and February 15th, 1943. Early in February,

(Testimony of Louis R. Gomberg.)

I think it was about the 1st or 2nd of February, OPA announced that that exemption for unfinished bulk wine in California or in any state, inter-winery [422] the state of production, was being terminated and that effective February 15, 1943, the ceiling would be put back on, so there was an upsurge in the movement or sale of bulk wine, at least inter-winery, and I dare say, other than inter-winery, on the basis that some of the bottlers—some bottlers operated bonded premises but were not actually bonded wineries in the strict sense——

Q. Well now, with respect to that announcement and regulation, I take it it was by regulation OPA made that ruling?

A. That is correct. The first one, as I remember it, was Amendment 41 to the GMPR, Amendment 41, and I am referring now to the unfinished wine, lifting the ceiling on unfinished wine, and it was—the ceiling was restored under Amendment 105, I believe it was.

Q. In February? A. In February, 1943?

Q. Did that 105 contain any provision with respect to the relative ceilings for finished and unfinished wines?

A. Yes, that regulation said that the ceiling on unfinished wine shall not exceed the ceiling on finished wine. You see that was a time there between November 25th of 1942 and February 15th, 1943, when the sky was the limit on unfinished wine, so it was necessary to impress on the industry regardless of what had happened during the preceding

(Testimony of Louis R. Gomberg.)

nine weeks that the ceiling was back on unfinished wine and nobody could charge more [423] for unfinished wine than for finished wine. That caused, of course, this flurry of inter-winery sales to subside. However, the trend away from bulk wine sales and toward bottled wine sales continued unabated during the remainder of 1943. It is my recollection that by the end of 1943, the last two or three months of 1943, that sales of California wine in bulk had all but ended. There were a few minor exceptions, but all of those exceptions, I believe, had reasons——

Q. What were those exceptions?

A. Well, one that I recall in particular was in the winery out here which decided that it would be advantageous to sell stock in the winery to about four or five bottlers to whom it had previously sold bulk wine. That stock was sold, and my understanding of the agreement is—I have never seen it personally, but I know the authors of the agreement intimately—my understanding of the agreement is that it provided that the stockholders would be entitled to a certain percentage of wine each year under the agreement, as long as they held the stock. As a result of that, there were sales by the corporation out here to the bottling corporation in the east at the ceiling prices for bulk wine, but——

Q. Those bottlers being the stockholders of the corporation?

A. Yes. Apart from that exception, and conceivably a few others with which I am not personally

(Testimony of Louis R. Gomberg.)

familiar, apart from [424] that in my opinion there was no such thing as any sale of bulk wine by the end of 1943. May I add to that this qualification, that there was no sale of bulk wine at the bulk wine ceilings by the end of 1943. Now, naturally, I and anyone else who had an intimate knowledge of the wine industry during that period know there were sales of wineries and wine inventories and that also there were sales, there were production deals whereby the producer out here made wine for the account of the bottler and shipped him wine. There was no sale, of course, in that type of situation.

Q. Yes. Now, with respect to—well, you said I think—How was the wine marketed beginning with the last three months of 1943 and continuing from there?

A. The average price paid for grapes for crushing in California in 1942 turned out to be $30.30 a ton. The OPA had made an allowance in its ceiling regulation of 1942—that was Amendment 54 to which I referred—for a maximum of $28.20. Therefore, the ceilings were not high enough to accommodate the price actually paid for grapes for crushing in the 1942 season, the ceilings established for 1942. That was one of the reasons, one of the principal reasons, why wine was not sold, or I should put it the other way, that wine was sold in decreasing volume, in bulk, during the early months of 1943, the early and middle months of 1943.

Q. With the exceptions you mentioned during

(Testimony of Louis R. Gomberg.)

that period [425] of time when the ceilings were off, I take it——

A. Well, that was limited to inter-winery sales in California. I was referring here to sales to the bottling trade primarily. I believe I forgot the rest of your question.

Q. Well, I will ask another. What were the marketing practices, or shall I say, how was the wine sold by the winery to the trade beginning in the latter months of 1943 and continuing on?

A. Well, I think I will have to carry you back just a little bit to present the whole picture.

Q. All right.

A. As 1943 progressed, it became increasingly obvious that wine could not be sold in bulk at a profit. The ceilings established in 1942 were too low for one thing, the demand was terrific for another thing. The problem of what price would have to be paid for grapes in 1943 became increasingly acute as the vintage season approached. Due to the scarcity of grapes for crushing and other considerations, the price paid for grapes for crushing in 1943 turned out to be on a statewide basis $79 per ton, as compared with $30 for a ton in 1942 and $20 a ton in 1941, and, to complete the picture, a low of $11 a ton in 1948—1938, pardon me.

Q. How high did it get in 1944?

A. In 1944 it reached $108 a ton. Inflation in the industry, in that branch of the California industry devoted to the [426] growing of grapes for crushing, in my studies, proved to be about as

(Testimony of Louis R. Gomberg.)

unbridled as in any—certainly any manufacturing industry, and I dare say any agricultural industry in this country during the war period.

Q. By the way, right at this point I want to ask you whether OPA came out with any regulations increasing the flat ceilings for bulk wine after MPR 445, Amendment 3?

A. Yes, they came out with another amendment in December of 1944. It superseded Amendment No. 3 to MPR 445.

Q. What ceiling did it provide?

A. It provided for ceilings of 88 cents for bulk red wine, $1.01 for bulk white wine, and $1.42 for sweet wine.

Q. When were those ceilings effective?

A. December 21, 1944.

Q. They were not made retroactive, so far as you know?

A. No. That second increase in the ceilings for bulk wine was in recognition of OPA's regrettable decision to allow grapes for crushing to remain outside the scope of price control. In other words, having left the door open, so to speak, for prices for grapes for crushing to run wild there was nothing OPA could do but make allowance for that by adjusting the wine ceilings accordingly. However, the ceilings were adjusted a year later.

Q. Excuse me.

A. I was just about to conclude the sentence. The ceilings [427] were adjusted a year late, and for that reason it became necessary to resort to

(Testimony of Louis R. Gomberg.)

other available means of recapturing costs and coming out at least at a break-even point, if not at a profit point.

Q. Now, a moment ago you were describing the condition that was beginning to develop in the early part of 1943, and I think you stated that it was obvious that producers could not sell bulk wine at a profit in view of their grape costs.

A. That's right.

Q. And that there was a decrease in the volume of wine that was sold in bulk. What did the bottlers do, if anything, under those conditions in order to secure stocks of wine?

A. As the supply of bulk wine began to dry up, one of my responsibilities at the Wine Institute was to placate unhappy bottlers.

Q. By supply, what do you refer to, physical supply or failure on the part of wineries to sell?

A. Well, at that time, in 1943, I would say it was some of both. There was a shortage of wine per se and in addition there was a reluctance to sell at the bulk ceilings.

Q. What about the 1942 crush, was that a good crush?

A. No, the 1942 crush was one of the shortest crushes in a number of years.

Q. By "short" you mean low volume?

A. Low volume crush. The supply of wine available for [428] market in 1943 was short.

Q. Go on, if you will, with what the bottlers did about this situation.

(Testimony of Louis R. Gomberg.)

A. The bottlers started telephoning and wiring out here, asking for assistance in locating supplies of wine. When that failed, as it did in most instances, the horde started coming out, and as I recall at one time I had as many as fifteen or twenty bottlers call on me in a few days' period, pleading with me to help them find supplies of wine. Of course, it was beyond my power to assist them, except to console them and do what I could to prevail upon wineries that could afford to do so to part with some wine in bulk. However, that situation proved to be impossible, because the ceilings were so low.

Q. Did you say impossible or possible?

A. That proved to be impossible, to get many wineries to part with much wine, because the bulk ceilings were so low that they just didn't make sense in relation to reality; so, as the year progressed, it became obvious that some way, some method had to be found to compensate for OPA's failure to establish ceilings on grapes for crushing. Such a method was found. I do not know exactly how it began, but I do know it did begin and that method, I am speaking now not of the sale of the winery in connection with an inventory, but the sale of wine——

Q. By the way, during 1943, did the bottlers purchase [429] any wineries?

A. Oh, indeed. There were many purchased.

Q. With their inventory? A. Yes.

Q. Do you know of any situations during that

(Testimony of Louis R. Gomberg.)

time where a bottler came out and purchased a winery without a wine inventory—I beg your pardon, yes, a wine inventory?

A. I have no personal recollection and I would seriously doubt if it ever happened in that period.

Q. This great number of bottlers that came from the east, and referring now to their purchases of wineries, did they say anything to you about those transactions? A. Yes.

Q. Generally, what did they say, what was their purpose in coming out? A. To find wine.

Q. Were they willing to buy the winery in order to get the wine at that time?

A. Yes, a number of them were and did buy wineries.

Q. And approximately, during that, during the year 19—well, beginning in the latter part of 1942 and on into and through 1943, approximately how many wineries were sold with an inventory of wine; do you have any idea at all?

A. I would estimate somewhere in the neighborhood—what period are you referring to? [430]

Q. Well, any period. Give us an estimate.

A. Well, I would say the purchase of wineries in order to acquire inventories began intensively in the fall of 1942, and reached its peak in 1943, and there were many sales, however, in 1944 as well. Those three years, 1942, 1943 and 1944. There were also some in 1945, but not so many. I would say that in the three year period, 1942, 1943 and 1944, that there were at least fifty to sixty sales

(Testimony of Louis R. Gomberg.)

of winery properties, including inventory, representing—and this is interesting, I think—representing well over half of the entire volume of the industry.

The Court: We will take a recess.

(Recess taken.)

The Court: Proceed.

Q. (By Mr. Marcussen): By volume, you meant production volume, did you?

A. Well, what——

Q. What did you mean?

A. Well, I meant production volume and inventory, storage capacity and sales volume all in one, because substantially the storage capacity of the winery measures its production capacity, its inventory capacity, and eventually its sales volume.

Q. Well, you say by volume; you meant, then, the available supply at that time, is that correct?

A. Yes. [431]

Q. Are you able to break that figure of approximately sixty sales of wineries and with an inventory of wine down, so as to give us a figure for—covering 1942 when it began and the year 1943—if you know, if you have the information or if you could approximate it at all.

A. I can approximate it roughly. About ten or fifteen in 1942, and about twenty or twenty-five in 1943, and the balance in 1944.

Q. Now, a moment ago I asked you what the wineries—I beg your pardon—what the bottlers did about the situation in order to get stocks of wine.

(Testimony of Louis R. Gomberg.)

You have described the purchase of wineries with their inventories. Will you describe the other transaction, or transactions, that were used in order to effectuate the sale of the wine in bulk from the winery to the bottler?

A. Well, there were three methods altogether and I am not including slight variations of the three methods. The three primary methods—Number one was to buy a winery with wine in it; number two was to make an agreement with the producing winery out here whereby the bottler would acquire a supply of wine by advancing the money for grapes, or making other suitable arrangements to the same effect and thus acquiring the production of that winery, in whole or in part.

Q. Were the grapes in that transaction crushed for the account of the bottler? [432]

A. More often than not they were, yes.

Q. Did the OPA establish ceilings with respect to those services of crushing? A. They did.

Q. What is the next, the third method?

A. The third method was what came later to be known as contract bottling or franchise bottling.

Q. Will you describe that, please?

A. In substance, that method consisted of the following steps: The bottler would come to the winery and say, "If you will deliver me wine, I will bottle it for your account. You pay me a fee for the bottling service and then I will buy the bottled wine after I bottle it for you." In that type of situation the winery would retain title to the

(Testimony of Louis R. Gomberg.)

wine until it was bottled by the bottler, then title would pass. At that time the winery would bill the bottler for the wine as bottled, charging him the maximum prices authorized for bottled wine by OPA, and then subtract the bottling service charge, which incidentally was not prescribed in dollars and cents under the OPA regulation at all times; OPA merely provided the charge for the bottling service was not to exceed the maximum charge for that service by the person performing that service in March, 1942, and if he did not perform that service in March of 1942 and did not offer to perform it, then he was permitted under the general provisions of the GMPR to use as ceiling for that service the [433] highest price charged for a similar service by his nearest competitor. Actually, and as a practical matter, it developed in the wine industry that a dollar a case became the usual and customary charge for bottling. However, at one point, during the acute shortage period in 1944—I have personal recollection of an instance where the bottler was so anxious to get the wine he charged the winery out here only 30 cents a case, and there were other instances too of below ceiling charges for the bottling service.

Now, the practical effect of that, Mr. Marcussen, the practical effect of that method of selling wine was to enable the winery to get back for the wine an amount substantially higher than the bulk ceiling for the wine, the same wine.

Q. Did that practice, do you know, result in

(Testimony of Louis R. Gomberg.)

any increase to the cost of wine, shall I say, or price of wine to the consumer?

A. No, it did not.

Q. Will you explain your answer, please.

A. OPA regulations, in effect from 1943 on, early 1943 on, permitted the wholesaler and the retailer to mark up over costs, to mark up their purchases of wine and liquor at prescribed percentage limits. The cost to the wholesaler was not to exceed the maximum prices established for the processor of the wine, which processor was meant the person who either sold the wine in bulk, if it was sold in bulk, or who bottled the [434] wine and then sold it to the wholesaler, so under that so-called contract or franchise bottling system the maximum amount that either the winery could charge the wholesaler if the winery did the bottling or the bottler could charge the wholesaler if the bottler did the bottling, the maximum amount that could be charged in either case was identical, so it simply became a question as to who would obtain the return, the allowance for the wine within the case goods ceiling, was it the winery or was it the bottler.

Q. A redistribution of profits, of the total profits, on the sales of the wholesaler?

A. Yes. Since the winery took the risk of reselling the wine at a price to return at least its grape cost, it was my feeling then, and my opinion has not changed, of the two the winery certainly was entitled to the profits between the winery and the

(Testimony of Louis R. Gomberg.)

bottler, because the bottler could always, and did in fact, either himself become the distributor or wholesaler of that wine and take his margin on the resale to the retailer, or if his business permitted he would resale to wholesalers and split the wholesaler mark up with the other wholesaler. That was permissible under the OPA regulations.

Q. Do you know whether during the years 1943 and 1944 when this contract bottling practice was resorted to in the wine industry, do you know whether the OPA during that time ever issued any announcement or rule or regulation or gave any [435] indication that that practice was legal or illegal?

A. Your question was do I know? Yes, I do know.

Q. Yes. Will you inform the court, please.

A. When my attention was first called to this practice of contract or franchise bottling, which was in the fall of 1943, it was my duty and I did in fact communicate with the Office of Price Administration, Washington, D. C., to ascertain whether there was any objection to the practice, or to that method of selling.

Q. Did you finally obtain a ruling?

A. I did. The ruling was an oral one, as were most of the rulings in that period because of the great number of problems and questions that were referred to the Office of Price Administration for ruling, and the ruling was that that method would not be interfered with.

(Testimony of Louis R. Gomberg.)

Q. How was the ruling obtained?

A. It was either in a long distance telephone call by me to the Washington, D. C., representative of the Wine Institute and thence by him to the Office of Price Administration, or it may have been in a telegram. I am not certain how it was transmitted.

Q. Now, from time to time were there any publications in the wine bulletins with respect to this practice of franchise bottling?

A. There was a report of franchise bottling, as I recall [436] it it was either in late 1944 or early 1945.

Q. You were familiar with the practice when it began, were you?

A. Approximately at its beginning, yes.

Q. What date is that again?

A. It was in October or November of 1943.

Mr. Brookes: Excuse me, Counsel. I didn't understand what you were asking him and what his answer was. What was in October and November of 1943?

The Witness: The practice.

Mr. Marcussen: The practice began.

Mr. Brookes: You were not asking him about the bulletins?

Mr. Marcussen: No, not about the bulletins.

Q. (By Mr. Marcussen): Now, can you explain why—well, was any mention ever made in bulletins about this practice in 1943 or 1944?

A. I don't recall that it was mentioned in 1943;

(Testimony of Louis R. Gomberg.)

it was mentioned in either the latter part of 1944 or the early part of 1945.

Q. Was that after or before you obtained this ruling? A. Oh, long after.

Q. Quite some time after?

A. Quite some time after, yes.

Q. Can you explain the absence, in your bulletins, of [437] information concerning this practice? A. Yes, I think I can.

Q. Will you do so, please.

A. The practice was obviously an effort to compensate for a deficiency in the regulations. There was no specific reference in any of the regulations to this particular practice of contract or franchise bottling. There was, however, a provision for the service of bottling wine. It was my feeling then, and the opinion of many attorneys with whom I discussed the matter, that although there was no specific authorization for that practice, neither was there a specific provision against it. When it was submitted to OPA——

Q. Excuse me. Did you give legal advice at all in these bulletins?

A. No, no. The information imparted in the bulletins was and is, or at least it was until I left the Institute in 1948, of a purely informational character. When anyone would ask for legal advice or information, an opinion as to some right or responsibility, he was advised to consult his attorney.

Q. Did the industry members make any inquir-

(Testimony of Louis R. Gomberg.)

ies in 1944 about this—or, in 1943 and 1944—about this practice?

A. Yes, they did; many of them.

Q. And did you explain it to them?

A. I did.

Q. Do you know whether or not it was spread quite rapidly in the wine industry? [438]

A. It is my recollection that the information and news about methods of marketing, yes, did spread rapidly.

Q. Now, I would like to have you describe for the court generally what classifications, marketwise, that the wine produced in California falls into.

A. The wine produced in California falls very generally into two classifications, so-called premium priced wines and popular priced wines. Now, it can be appreciated that not all wine is precisely in either one group or the other. There are variations, varying from very high priced premium wines down to low priced premium wines and similarly from relatively high priced popular priced wine to very low priced popular priced wine. By and large, the price of the wine determines or bears a relationship to its quality. The relationship is not a necessary one, however.

Q. Yes. Now, I would like to ask you with respect to that, were those terms used in the industry at all?

A. Those terms have been used in the industry to a large extent since about 1940 or 1941.

(Testimony of Louis R. Gomberg.)

Q. Can you tell the court how they came to be used?

A. Yes. It was one of my responsibilities to conceive and disseminate information about the wine industry that favored the industry, in preference to dissemination of information that was to the disadvantage of the industry. Prior to that time, wines were commonly known as fancy wines or fine wines on the [439] one hand and ordinary wines or standard wines on the other hand, and it was my feeling that the term or terms ordinary wine or standard wine did not do justice to the wine; that a better term could be found, and so I recommended, and the term was adopted and is now quite widely used, of popular priced wines, which do not bear any necessary connotation one way or the other as to their quality, whereas ordinary and standard wines do bear an unfavorable reference to quality. On the other hand——

Q. Excuse me just a moment. You don't mean to say as distinguished between premium priced wines and popular priced wines?

A. No, these terms were mutually independent, each one standing on its own feet, so to speak.

Q. In other words, the terms standard wines and ordinary wines had objectionable connotations as far as the industry was concerned?

A. For public relations reasons, yes.

The Court: Just why is it beneficial for the court to know this?

Mr. Marcussen: If Your Honor please, it is

(Testimony of Louis R. Gomberg.)

necessary in order to give Your Honor a background with respect to this material and also in connection with the cross-examination of Mr. Brookes of Respondent's Witness Mondavi yesterday, to explain the—he went into the qualities of the wine and the [440] types of wine, and I just merely want to describe generally what they were.

The Court: We do not have the problem here of the bottled wine, or, if you want to use that term, of circumventing; we do not have here the problem of adopting that means of getting away from the ceiling price, it seems to me. This has all been very interesting. It certainly has all been very new to me. I am interested, but I am not sure we need all this background in order to get down to the kernel of this controversy here.

Mr. Marcussen: Your Honor, this is all by way of leading up to an explanation of the situation in Napa County that was brought out by counsel, and I think there—you see, where franchise bottling—the evidence will show ordinary wines were bottled under that method, and as indeed they had been before. By ordinary wines, I mean what the witness has described, has designated as popular priced wines, and there was a considerable amount of material brought out by counsel in an attempt to show, in the impeachment of the witness Mondavi yesterday——

The Court: I want you to get everything in that is material or that you want to put in, but I do not want to take up too much time on general

(Testimony of Louis R. Gomberg.)

educational matters. This case is going to close this afternoon.

Mr. Marcussen: Yes, indeed it will. [441]

Mr. Brookes: I want to refresh your recollection.

Mr. Marcussen: Certainly.

Mr. Brookes: I think counsel has forgotten, both on direct and cross Mr. Mondavi testified that what he referred to as their competitive wine was sold under this contract bottling method and he identified their competitive wine as being wine of the lowest grade they made, which was a year or less old, and certainly the category you have been at some pains to define would not come under that title.

Mr. Marcussen: Notwithstanding your present statement of your understanding of his testimony, you went into considerable lengths in developing the quality of wines sold in Napa—produced in Napa County and also sold by that county. It seems to me I must make a broad——

The Court: Go ahead. I just wanted to clarify it a little. I hope you confine it to material matters.

Mr. Marcussen: I certainly will, Your Honor. I want to explain—the background is over with now. I will ask the witness a number of questions pertaining to specific information in the industry and in the trade and which will have a definite bearing on the testimony that has already been brought out in the case, the background is over.

The Court: Keep him down to the testimony.

Mr. Marcussen: I am qualifying him as an ex-

(Testimony of Louis R. Gomberg.)

pert to testify as to the value of wine during that time. I will do that [442] very briefly. I might as well do that right away, and I would like to abandon my questioning, Mr. Gomberg, concerning the classifications of wines and ask you whether, based upon your experience in the wine industry, you have an opinion as to the value of bulk wine in—dry wines in December of 1943?

The Witness: Yes, I do.

Q. (By Mr. Marcussen): Will you state for the court what, in your opinion, was that value?

A. In my opinion, the value, the market value of bulk dry wine in—did you say 1943?

Q. December, 1943.

A. In December, 1943, it was approximately $1.00 a gallon.

Q. And what is that opinion based upon?

A. That opinion is based upon a personal knowledge of how the OPA ceiling for bulk—for bottled current wines were constructed.

Q. Yes. You were aware of the ceiling?

A. Yes, and if you will compute back from the bottled wine ceilings for current red wine, for example, effective in October of 1943, if you will compute back and make allowances for the actual cost incurred by, let us say, the average winery——

Q. You mean winery or bottler? [443]

A. The average cost incurred in connection with the bottling of the wine, whether it is done by the winery or the bottler, you will come up in round numbers with about a dollar a gallon. You can get

(Testimony of Louis R. Gomberg.)

as low as 75 or 80 cents a gallon and as high as $1.25 a gallon, depending on the amount of allowance you make for each element of cost.

Q. Do you know whether or not, in order for a winery to dispose of its wine by contract bottling it was necessary for him to have any long standing connections in the various distribution centers of the country or any connections at all?

A. It was not.

Q. Explain that, please.

A. Well, the demand for wine was so great in this period that bottlers came out here from the east and middle west and scoured the countryside, hired an automobile and drove from winery to winery to locate the supply of wine. That being the case, it was not difficult at all; in fact, all the winery proprietor had to do was wait in his winery and someone would call on him sooner or later, mostly sooner, and ask him if he wanted to dispose of his wine.

Q. Were there any other practices or types of marketing practices you had in mind in giving that opinion as to the value of wine?

A. Any other marketing practices?

Q. Yes. I am referring now to the purchase of a winery [444] with its entire stock of wine.

Mr. Brookes: Your Honor, I object to the question. I think it is somewhat leading.

Q. (By Mr. Marcussen): I will ask you, are there any other marketing practices—by marketing practices I refer to practices of the bottlers in

(Testimony of Louis R. Gomberg.)

seeking stocks of wine—are there any other practices upon which you base your opinion?

A. Other—in addition to what?

Q. Than franchise bottling?

A. Oh, I beg your pardon. Well, I mentioned the purchase of the winery with the wine. I mentioned the production of wine for the account of the bottler, and that there is a contract or franchise bottling——

Q. The second one, of course—would the second one have anything to do with your opinion?

A. As to the value?

Q. The value of the wine.

A. No, because I understood your question to be how were bottlers able to get wine during the shortage period.

Q. What is your opinion based upon, your opinion wine was worth a dollar a gallon in 1943?

A. It is based upon the reflected return to the winery for the so-called flat case goods ceilings established by the OPA in October of 1943. [445]

Q. And upon what marketing practices, what marketing practices was it based upon—franchise bottling?

A. I would say primarily upon franchise bottling.

Q. Is it based upon the bulk sale of the wine and the winery at all?

A. The bulk sale of the wine with the winery?

Q. Yes.

A. No it is based upon the amount of money

(Testimony of Louis R. Gomberg.)

that the winery could get for the wine in the form of bottled goods. We know that the ceilings on bulk were so low the winery could not afford to sell in bulk, and under OPA ceilings stay in business, so the only method the winery had to market its wine in a manner consistent with OPA regulations by which one could measure the market value of the wine was contract or franchise bottling. That, in turn, enabled one to ascertain what the market value was or would have been in the event a winery had been sold along with the wine.

Q. Yes. And are you familiar, do you know generally the type of—are you familiar generally with the type of transaction involved in the purchase and sale of a winery with the wine inventory, during this period of time?

A. Yes, I am familiar with it.

Q. Do you know whether or not, have you any opinion as to what price for the wine is reflected in such sales?

Mr. Brookes: Your Honor, I object. He is cross-examining his own witness now. He asked the same question either two or three times and has received specific answers.

The Court: I think he has rather intruded upon the petitioner's province here. Maybe you may not have to cross examine. Maybe we can save time this way. I will overrule the objection to the question.

Mr. Marcussen: Will you read that last question, please.

(Question read.)

(Testimony of Louis R. Gomberg.)

The Witness: Yes, I do have an opinion.

Q. (By Mr. Marcussen): What is that, what price do you have in mind?

A. The same price, one dollar a gallon, more or less, as in the case of the sale of the wine by the so-called franchise or contract bottling method.

Q. Were you having any difficulty understanding my preceding question with respect to the basis of your opinion?

A. I misunderstood you, Mr. Marcussen. I understood you to ask, entirely apart from any other consideration, what would the price of the wine be and what would the price of the plant be, or what would the price of the wine be in the sale of a winery with its inventory.

Q. Yes.

A. I explained now that the yardstick in determining the market value of the wine sold in combination with the winery [447] would be what the winery could get for the wine by that method, or by any other method of marketing.

Q. Yes. Now, returning——

Mr. Marcussen: If Your Honor please, I am at a breaking point, if Your Honor would like to take a recess.

The Court: Well, what time is it?

Mr. Marcussen: I think it is 12:30, Your Honor.

The Court: All right. We will adjourn until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [448]

Afternoon Session—2:00 p.m.

The Court: Proceed.

Mr. Marcussen: Will you take the stand, please, Mr. Gomberg.

Whereupon,

LOUIS R. GOMBERG

was called as a witness on behalf of the Respondent, and having been previously duly sworn, testified as follows:

Direct Examination—(Resumed)

Q. (By Mr. Marcussen): Now, you were describing generally the two classifications of wine this morning, premium priced wines and popular priced brands. Will you describe—I think you described the general price situation with respect to those. I want to ask you about the quality of the premium wines as distinguished from popular priced wines.

A. Well, on the whole, quality of the premium priced wines is markedly superior to the quality of the popular priced wines.

Q. Yes. Now, during 1943 and at any other time that you wish to give an answer with respect to that, generally what is the percentage of premium priced wines and popular priced wines that is sold in California—from California products?

A. Generally the percentage of premium priced wines is about 5 per cent or less, and popular priced wines are the remaining 95 per cent or more. [449]

Q. This morning, do you recall whether you described the term "current wines" as it was used

(Testimony of Louis R. Gomberg.)

by the OPA? A. I believe I did.

Q. Did you identify the age of current wines?

A. I did, by illustration, I believe.

Q. Do you know it by months?

A. Well, in practical effect, it amounts to a maximum of eighteen months——

Q. Well, in fact——

A. For current wines.

Q. Is that not the definition of the OPA, as a matter of fact?

A. It is, from one standpoint, and the actual year of the wine is from another standpoint. If the OPA regulation that invoked that definition had gone on for many years, eighteen months would have become the yardstick, but at that time it defined any wine produced in 1941 or earlier years as non-current wine, and any wine produced in the 1942 or 1943 seasons as current wine, except to the extent of the blending which I described this morning.

Q. Yes. Was there not a phrase of eighteen months used in the definition of wine under the OPA?

A. That was the simple method of referring to the difference between current wine and non-current wine; the wine that was eighteen months or older was entitled to non-current [450] wine designation; under eighteen months, current wine.

Q. Eighteen months was specified in the regulations, was it, or was it not, that you recall?

A. It is my recollection eighteen months was

(Testimony of Louis R. Gomberg.)

referred to in the interpretations and in conversations pertaining to the OPA regulations, but the actual definition of current wine was as I described it this morning.

Q. Do you have it there with you if counsel should be interested in it? A. Yes, I do.

Q. Now, were you here in the courtroom upon the cross-examination of Mr. Mondavi yesterday?

A. I was.

Q. Do you recall—did you listen to the cross-examination pertaining to the difference between Sonoma County wine and Napa Valley wine?

A. I did.

Q. Can you state whether there is any difference between wines produced in those two counties, referring to wine that would be sold under popular prices?

A. Basically there would be no difference, provided, of course, that the circumstances of the products were similar; for example, produced from the same variety of grapes, produced by the same or substantially the same production techniques and so forth—there would be no observable difference.

Q. In any event, whether there would be any difference in quality or not, do you know whether or not there was any difference in price between popular priced wines from those two counties?

A. At what time, Mr. Marcussen?

Q. During 1943 and 1944?

A. To the best of my knowledge, there was no difference.

(Testimony of Louis R. Gomberg.)

Q. Now, do you know whether in the latter months of 1943, including December, 1943, there was any difference in the market price or market value between finished and unfinished wines?

A. What was the first part of your question?

Mr. Marcussen: Will you read it, please.

(Question read.)

The Witness: I do know the answer to that, yes.

Q. (By Mr. Marcussen): Will you state it, please.

A. The answer is there was no difference.

Q. How do you account for that?

A. In this way: the OPA ceilings on bulk wine were identical for finished wine and for unfinished wine. With respect to bottled wine, bottled, for example, under the franchise or contract bottling method or any other way, for that matter, but particularly under the franchise or contract bottling method, the buyer of the wine, the bottler, was so anxious to get the wine that if the wine did not have—was not finished, he would [452] make allowance for the finishing, which is a relatively small—two and a half cents was the OPA ceiling in the return to the winery. If the bottler had finishing facilities of his own, as often as not, in the case of wineries that did not have finishing facilities, he, the bottler, would finish the wine and that was considered purely incidental.

Q. Subject to that qualification of two and a half per cent, there was no substantial difference?

(Testimony of Louis R. Gomberg.)

A. Two and a half cents.

Q. What did I say?

A. You said per cent.

Q. I beg your pardon. There was some testimony here yesterday about lees, and concerning particularly lees in Mr. Particelli's wine. Can you state what the maximum allowable shrinkage is as determined by the Alcohol Tax Unit, or under the Alcohol Tax Laws and Regulations for wine that has just been produced? A. Yes, I can.

Q. Will you state that? A. 6 per cent.

Q. 6 percent per year?

A. Yes. That is on new production, for the first year.

Q. What is it in succeeding years?

A. 3 per cent.

Q. What does the 6 per cent include? [453]

A. The 6 per cent includes losses due to leakage, evaporation, and the presence of the lees, which, of course, become a substance other than wine when the wine is racked, finally racked.

Q. The lees, I take it, are the dregs?

A. That is correct.

Q. And do you know what the maximum percentage—what is the percentage, both in terms of average maximums and any way you wish to state, what is the percentage of lees in wine?

A. I can best answer that question by describing the method of arriving at the answer. After wine is crushed and fermented, it is then removed. The wine, the liquid, is removed from the fermenter.

(Testimony of Louis R. Gomberg.)

In the removal naturally some of the solid particles which were present in the original juice and must —that is the name for the juice—and the pulp and the skins and the seeds, some of the solid particles are carried off in the storage tank, where the wine is deposited for storage or whatever further treatment is to be given.

Q. Are there any dregs left in the crusher?

A. Oh, yes—not in the crusher, in the fermentation tank. The fermentation tank is full of residue, the residue consisting of skins, the seeds and the pulp.

Q. That is not the lees?

A. No, that is not the lees. That is called pomace. What remains in the fermenting tank after the clear wine is [454] drawn off is called pomace. The lees start depositing the moment the new wine is placed in a storage tank, and it is my opinion, based on personal observations and conversations with wineries over the years, that the lees account normally for somewhere between 1 and 2 per cent of the volume of wine deposited in the storage tank. I would say it would be about 3 per cent. Now, that opinion is underlined, so to speak, in connection with the Alcohol Tax Unit Regulation No. 7, governing the production of wine, which prescribes that the maximum loss of wine allowable without proof of special loss during the first year following production is 6 per cent, and that thereafter it is 3 per cent. That difference between 3 per cent in suc-

(Testimony of Louis R. Gomberg.)

ceeding years and 6 per cent the first year is to accommodate the lees.

Q. Now, can you state whether under the OPA regulations sales in 5 gallon demijohns and in barrels of any size, whatever the sizes are—and I would like to have you specify—whether such sales in barrels and in demijohns are regarded as bulk sales?

A. They were then regarded as bulk sales, that is correct.

Q. By the way, in the trade, what are the various sizes of barrels used for wholesaling of wine?

A. Nowadays very few barrels are used for sales of wine.

Q. How about in 1943?

A. In 1943 the sizes in use—and by the way at that [455] time barrels were beginning to become almost extinct—the barrels then in use were 50 gallons, normally; 50 gallons, 25 gallons and 10 gallons. The demijohn to which you referred is a container which, depending upon the particular use made of it, contains either 5 gallons or 4.9 gallons.

Q. Yes. Now, there was some testimony here yesterday concerning cooperage. What is cooperage and what are the various types of cooperage in use here in California and particularly in the north coast country?

A. The word "cooperage" is used in the wine industry in California as meaning a vessel or receptacle in which wine is stored or transported, or in the case of fermentation in which the wine is fermented. In other words, a vessel of some kind

(Testimony of Louis R. Gomberg.)

used for retaining wine for a short period of time, or a long period of time.

Q. Could you describe the materials from which they are made?

A. There are three types of cooperage used in the wine industry in California, used now and in 1943. There are some minor exceptions, but broadly speaking there are three types and were then. The most popular by far is the so-called redwood storage fermenting tank, made of what the average person might think of as redwood two by fours. Actually, they are not exactly two by fours, but they resemble two by fours. That is by far the most common. The next most common is concrete, [456] again used both for fermenting and for storage, concrete tanks; and the third consists of oak containers, ranging all the way from relatively large ones, standing perhaps 10, 15 feet high, down to very small ones. The smallest in normal winery use would be the 50 gallon barrel. The larger containers are called oak casks or oak ovals.

Q. Which of the three types you mentioned is the cheapest from the point of view of construction or cheapest from the point of view—well, cost obviously, and which is the most expensive?

A. The most expensive is the oak for many reasons.

Q. You don't need to give the reasons, Mr. Gomberg.

A. The least expensive——

Q. Which is the cheapest?

A. The least expensive would be redwood, de-

(Testimony of Louis R. Gomberg.)

pending upon age. If it is old redwood it would be least expensive. If it is broken down concrete, of course, it might be less expensive than some redwood.

Q. Well, now, you said old redwood. What do you mean by old redwood?

A. Well, redwood storage tanks have been used in the wine industry in California for close to a hundred years, and there are some almost a hundred years old still in use. If they are in good condition, it is my opinion those redwood tanks could be worth as much as relatively newer tanks in equally [457] good condition. I better illustrate that by the cost of cents per gallon. New redwood storage tanks cost about 10 cents per gallon now. Old redwood storage tanks, in poor condition, can be bought for as low as a cent or two a gallon. I would say probably the average condition, considering the average condition of redwood storage in California for wine, it is probably somewhere halfway between the 1 cent and 10 cents, about 5 or 6 cents.

Q. Now, are you familiar with the general yardsticks used in the wine industry for valuing a winery? A. Yes.

Q. In what terms do they value it?

A. A rule of thumb method is cents per gallon of storage capacity.

Q. And will you state what, in your opinion—are you familiar with the general levels of values for wineries in the year 1943? A. Yes.

Q. And are you familiar with the value before

(Testimony of Louis R. Gomberg.)

the war? A. Yes.

Q. Will you state what the values generally were before the war?

A. Well, there has been a rule of thumb in the wine industry since I first became acquainted with it, that the value of winery property in the so-called dry wine producing regions, [458] where they do not have normally freezing equipment, refrigeration equipment, or pasteurizing equipment, or rather elaborate facilities, where they do not have stills and large boilers like they do in the central valley of California, the rule of thumb was about 10 cents per gallon. Now, that included not only the cooperage, which was normally redwood cooperage, like I described a moment ago, but it would also include the buildings and the land, of course, on which the building was situated and a moderate or minimum amount of equipment, such as a rough filter, naturally hose lines, perhaps a few pumps, maybe a small boiler.

Q. How about a crusher?

A. And a crusher.

Q. And after the war, what range of values was established for wineries, generally, in the wine industry?

A. By after the war, at what point?

Q. During the war, I should say.

A. During the war?

Q. Yes.

A. There was a rise in the value of winery properties during the war, just like there was of other

(Testimony of Louis R. Gomberg.)

properties. The extent of that rise I can not specifically and precisely determine but it would be my opinion that about a 50 per cent increase in value occurred during the war period. Roughly that would mean in a winery having a rule of thumb value of 10 cents [459] a gallon before the war, it could be expected to have a rule of thumb value of about 15 cents a gallon during the war.

Q. Now——

A. Mind you, I am speaking, Mr. Marcussen, not of new construction, because new construction went up to 20, 30 and 40 cents a gallon right after the war. I am speaking of construction existing before the war and its relative value during the war.

Q. Yes. Well, what about the—well, strike that, please.

Now, are you familiar with, in a general way, with the laws and regulations pertaining to the alcohol tax, Federal Alcohol Tax?

A. I am quite conversant with it, yes.

Q. You are familiar, are you, with the fact that stamps are placed upon the wine when it is sold?

A. I am familiar with the fact that stamps are placed upon the wine when it is sold and stamps are also disposed of in certain other ways when the wine is sold, yes.

Q. Do you know whether or not a person—a wine producer, how he may dispose of stamps other than by actual use? A. You mean normally?

Q. Yes. Specifically I wanted to know may he return them, can he redeem them?

(Testimony of Louis R. Gomberg.)

A. They may be redeemed at the close of the winemaker's [460] operations if he terminates his bond, yes.

Q. And under what other conditions?

A. In certain cases loss by casualty; when there is a loss by casualty the stamps may be replaced under certain conditions.

Q. I am talking merely now about the redemption of stamps. How about denominations?

A. Well, for example, if a person has stamps of too high or too low a denomination for his practice, provision is made for exchange of stamps for a usable denomination, for a denomination that cannot be used in the normal course of the winemaker's business.

Q. Other than those two situations, are there any other situations under which wine stamps may be redeemed, so far as you know?

A. Not to my knowledge.

Q. Now, there has been a good deal of testimony offered here concerning bonded premises and shipments tax paid and under bond. Would you explain very briefly and generally what the situation is with respect to that?

A. Well, under the Internal Revenue Code when wine is produced the incidence of the tax applicable to the wine attaches. That appears when the wine attains one half of one per cent by volume of alcohol or more. For that reason the Treasury Department, Internal Revenue, bond premises for the production of wine, [461] the bond being used as an

(Testimony of Louis R. Gomberg.)

assurance by the Treasury Department of ultimate payment of the tax for the wine at the time of its production. The tax is not actually payable by the cancellation of stamps until it is sold or removed from the bonded premises for consumption or sale. Now, wine can be transferred in bond—that means without the tax yet having been paid, although the obligation to pay the tax has arisen at the time of production—from winery to winery. There are also other types of premises——

Q. The receiving winery must be a bonded winery?

A. Yes. There are also two other types of premises as to which wine can be transferred in bond. Bonded storerooms, as distinguished from bonded wineries and bonded field warehouses—I think reference was made earlier in the trial to bonded field warehouses for the deposit of wine temporarily as a basis for hypothecation of the wine. Wine can also be transferred in bond for export, or can be transferred in bond to a fruit distillery for distillation. I believe that includes all of the ways in which wine may be transferred, from the premises where produced. Tax paid transfers of wine are, as the name implies, removals of wine—strictly speaking, sales, but as a practical matter the Treasury Department does not enforce that—physical removals of wine from bonded premises. The moment the wine is severed physically from the bonded premises, any bonded premises other than a transfer in bond over

(Testimony of Louis R. Gomberg.)

unbonded [462] premises, for example, the wine must be tax paid.

Q. Are bottling establishments ever bonded?

A. Oh, yes.

Q. Now, state very briefly and succinctly, if you will, Mr. Gomberg, the process by which wine is produced, that is, just the process that it goes through.

A. The grapes, having been grown, are harvested, delivered to the winery, normally in what are known as field lug boxes or——

Q. That is too much detail, Mr. Gomberg.

A. All right. Grapes, having been delivered to the winery, are crushed; the crushed grapes, including the juice, the skins and the seeds and pulps are deposited in fermenting tanks where the wine undergoes fermentation for a period normally of about a week to ten days or two weeks; from there the clear wine, meaning the juice, the fermented juice, is drawn off and deposited in a storage tank or other storage receptacle where it undergoes settling and, depending upon the marketing practices of the particular vintner, either remains for aging—after a certain period of time the wine is racked, meaning transferred from one container to another, and the dregs are, or settlings, known technically as lees, are allowed to settle out at the bottom and segregated from the clear wine above it. That goes on two or three times a year, sometimes only once or twice, and eventually when the wine is ready for marketing it undergoes [463] two or three, some-

(Testimony of Louis R. Gomberg.)

times only one, of these operations.

Q. What operations, the racking operation?

A. This is after racking. When the wine is ready to be finally prepared for marketing, it may or may not have been blended in the meantime, the wine is filtered, usually given what is known as a rough filter or filtration; it may or may not be subjected to chilling; it may or may not be subjected to pasteurization.

Q. What is the purpose of the chilling and the pasteurization?

A. The chilling is to facilitate—it facilitates the deposits, the settling out of any solid particles in the wine, so when the wine reaches the consumer it is not likely to be cloudy. Pasteurization is performed for the purpose of reducing or eliminating the presence of bacteria in the wine, which might cause spoilage at a later time. Wine is a living organism in the sense that it consists not only of the moisture and the water present in the grapes, but many chemical constituents and biological constituents that continue to remain in the wine right up to the time it is consumed.

Q. You mean bacteria?

A. Well, that is a name that has an unpleasant connotation. Actually, that is what it is, yes. For that reason wine is treated normally—not a hundred per cent—is treated with what is known as sulphur dioxide. Sulphur dioxide is a [464] bacteria inhibiting agent that keeps these bacteria from going to work in the wrong way and spoiling the

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wine, so the three final steps are the rough filtering and the application of heat and/or cold, and finally what is known as a polishing filtration. That takes out, or should take out, all remaining solid particles. Now, there is another step I haven't mentioned, known as fining. Fining is, in a sense, a form of filtration. It is to remove little amounts of unwanted color, for example, or to remove other substances that may have become present in the wine due to causes apart from the original material itself, such as, for example, contamination by iron. Those substances are removed in a process known as blue fining; then, the wine after those steps is ready for bottling and eventual consumption.

Q. Now, yesterday something was said about—well, strike that, please. In the preparation of wine, how long does the settling out process take—in the racking of wine, over how long a period would the wine be racked?

A. Normally it goes on for a period of about twelve to eighteen months, the settling out process, but the settling out process—to ask how long it takes is really to beg the question. The question of how long the settling out process takes should be asked in this way: How quickly is there a market for the wine? If there is a market for the wine immediately, some people subject it to chilling treatment to hasten the dropping [465] out of the particles that would otherwise drop out slowly in normal settling, and the wine may be marketed in 30 days, 60 days, 90 days. If the market is poor and

(Testimony of Louis R. Gomberg.)

there is no sale for the wine right away, the wine may remain in the winery for years. No matter how long the wine remains in storage, the settling process goes on indefinitely.

Q. After it has remained there for a couple of years, would it be necessary to do any chilling or pasteurization?

A. It still may, depending on the condition of the wine, yes.

Q. Something was said yesterday about the fact that it took approximately four years for red wine to age. Will you tell the court what you know about that?

A. Well, the testimony that I heard that referred to four years I believe had to do with so-called premium priced wines. It is my opinion that the average age of premium priced red wines in California is about three or four years. However, they constitute, as I testified earlier, only a very small percentage of the total production of California wines, perhaps in red wines 3 per cent of the total; maybe 2½ per cent. Normally—when I say normally, I mean the 95-odd per cent of popular priced wines—the aging period is whatever length of time it takes to find a market for the wine, but most wineries observe a practice of aging the wine at least six to eight weeks even if the pressure is terrific for the wine, like it was in [466] 1943 and 1944—they still hold it off the market. They won't sell it right away. I would say the normal period for aging wine on account of the fact—that is, the rate

(Testimony of Louis R. Gomberg.)

of movement out in relation to production and demand is about 12 to 18 months in California for standard or popular priced wine.

Mr. Marcussen: That is all.

The Witness: May I get a drink of water?

The Court: Yes. I think we will have to give you a recess.

Cross Examination

Q. (By Mr. Brookes): Mr. Gomberg, are you a chemist? A. No, I am not, Mr. Brookes.

Q. Did you study chemistry?

A. I had a couple of courses in high school, yes.

Q. Have you ever made wine?

A. Personally?

Q. Yes. A. No, I have not.

Q. Have you ever operated a winery?

A. No, I have not.

Q. Well, are you what might be termed a production man in the wine field?

A. No, I am a consultant to all branches of the industry, [467] including production, but the consultation—let me explain—the consultation is in connection with—well, let me illustrate that. Perhaps it is the best way. If a production problem arises involving Alcohol Tax Unit regulations, naturally I must inform myself fully about the production processes involved so I can handle the problem intelligently. Similarly, let us say there is a chemical problem which arises—I am not a chemist, but I have managed to inform myself sufficiently with respect to wine chemistry so I am familiar

(Testimony of Louis R. Gomberg.)

with the chemical reactions and processes that take place, but I do not profess to be a chemist.

Q. Then, if a winery wished to employ a consultant for the purpose of making a better product, a better wine, a finer type of wine, there is another type of consultant they would employ rather than yourself? A. That is correct.

Q. In your description of the process of making wine, including what I think you refered to as the speeding-up process, I didn't hear any reference to the process which I had heard described as clarification. Are you acquainted with that?

A. Yes. Clarification is a loose term referring specifically to all of those processes which involve removal of the sediment and solid particles in the wine; not, however, including those physical reactions that take place—I shouldn't [468] say physical, I should say chemical reactions that bring about a change in the chemical composition of the wine. For example, clarification is a broad term which includes filtering and fining and chilling and pasteurizing by way of example. It does not, however, include all of the—strictly speaking—all of the fining. For example, in blue fining, a chemical reaction takes place. It is true that that is fining, but strictly speaking clarification means to clarify, to make clear, but in blue fining more often than not the wine is perfectly clear when it is subjected to the blue fining process.

Mr. Marcussen: Are you saying blue fining?

The Witness: Blue fining, yes. The purpose of

(Testimony of Louis R. Gomberg.)

that is anticipatory. It is to prevent the clouding of the wine due to the presence of the metals which experience has demonstrated in the past is likely to occur unless these precautionary measures are taken.

Q. (By Mr. Brookes): In the process which generally can be referred to as clarification, are there any chemicals used?

A. Oh, yes, sure. If by chemicals you mean those substances which are really inert, like diatomaceous earth.

Q. Are there others?

A. Lots of them. Bentonite—do you want a list?

Q. No. I imagine it would be a long list. [469]

A. Yes, it would be a long list.

Q. In regard to the Wine Institute, Mr. Gomberg, what is the primary purpose of the existence of the Wine Institute?

A. I think you will have to make your—what is it, your noun, my grammar is not very good. You may have to make it plural "purposes." The Wine Institute, I would say, has three primary purposes: one is to inform and educate the public about wine; two is to inform and in a sense educate the industry about things that pertain to wine production; and third is to represent the industry in connection with all types of industry problems, federal and state, international and so on. Now, of course, those are rather broad terms, but generally speaking that is the way I would describe the activities of the institute.

(Testimony of Louis R. Gomberg.)

Q. Is the purpose of informing and educating the public to increase the sale of wine?

A. Precisely.

Q. Do you know what the per capita figures are for the consumption of wine in California?

A. Yes.

Q. Do you know what they are on the national average? A. Yes.

Q. Will you state to the court what those two per capita figures are?

A. Yes. Year to year, or what would you like?

Q. I think a representative year would be satisfactory.

A. A representative year for California in the last 15 years would have to be somewhere between two to three gallons per capita because fifteen years ago our per capita rate was just about level at three —no material increase in the absolute quantity of wine consumed, that is to say, the gallonage consumer, the per capita has gone down to approximately two gallons, so a representative figure in that fifteen year period would be about two and a half gallons per capita. It ranged from three down to two, approximately. The national per capita has ranged all the way from two-tenths of a gallon up to just shy of a gallon per capita. A representative per capita consumption rate for the United States for that time would be about eight-tenths of a gallon per capita.

Q. Is there any difference in the per capita figure between northern and southern California?

(Testimony of Louis R. Gomberg.)

A. It is my opinion that there is, but to the best of my knowledge—certainly when I was with the Wine Institute—there was no such study made. I should say no intensive study, and I don't know whether there has been a study made since my leaving two years ago. I would be inclined to doubt it. I think I would have known about it. In my opinion, the per capita consumption in Northern California is greater than the per capita consumption in Southern California.

Q. Then it would appear that the need for the education [471] of the public for the consumption of wine is less felt in Northern California than elsewhere in the United States, is that a correct inference from what you said?

A. I think in a very general way that statement would stand as substantially correct.

Q. Mr. Gomberg, is the purpose of—well, preliminarily, you stated the second of the purposes of the Wine Institute was the improvement of production methods in the wineries, and the improvement of the products, is that a correct paraphrase of what you said?

A. No. I said the second step was the information and, to some extent, the education of the industry pertaining to all phases of the industry's operations.

Q. Well, then, the Wine Institute is not concerned with educating the members of the industry as to their production methods and problems?

A. That isn't what I said. What I said was,

(Testimony of Louis R. Gomberg.)

number one was the information and education of the general public; number two was the information and education of the industry.

Q. In what respects?

A. In all respects, pertaining to winery operations, production problems, labeling and improvement of labels and advertising techniques, and so on and so forth indefinitely.

Mr. Marcussen: Excuse me for interrupting, Counsel. When you first mentioned those three primary purposes I do recall [472] that you did say something about informing the industry about production.

The Witness: Well, that is one of them, yes, and I repeated that just now, but I didn't intend to limit it to production matters.

Q. (By Mr. Brookes): But then, one of the purposes, or if not purposes functions of the Wine Institute is to do what it can to improve the quality of production of California wine?

A. I would say that is very definitely one of its purposes.

Q. Is that an end in itself, or an end in assisting the ready marketing of the product?

A. That calls for an opinion that I may not be qualified to answer.

Mr. Marcussen: I don't hear you, Mr. Gomberg.

The Witness: May I have the question again, please.

(Question read.)

The Witness: Well, first let me explain I am not

(Testimony of Louis R. Gomberg.)

now affiliated with the Wine Institute, so I am not in a position to speak officially for them, or even unofficially, but it was my opinion at the time I was with the Institute that the basic job was to increase wine consumption, and that the instruments of doing that job were the three types of activities that I described. I think if there is any answer to your question—[473]—I am not sure I am capable of answering it—it would be ultimately, everything would be aimed toward increasing consumption and rendering the industry more profitable, more prosperous.

Q. (By Mr. Brookes): Does the Wine Institute tend to lay emphasis in giving information regarding production upon the improvements in production methods and design which are of particular interest in the manufacture of large quantities of wine by a single winery?

A. I think I understand the import of your question. The answer is no. But let me repeat, if I may, in the last two years, not having been there, would you limit your question to the period of time?

Q. I will limit my question to the period of time you were affiliated with the Wine Institute.

A. The answer to your question would be no.

Q. What is the method by which the Wine Institute disseminates its production information?

A. I am glad you asked that. That happened to be one of the facets of my work at the Wine Institute. In 1940 the Wine Institute organized what was known, and still is, as the Technical Advisory

(Testimony of Louis R. Gomberg.)

Committee of the Wine Institute, and that committee consisted of about twenty-five winemakers from various wineries up and down the state, large and small. It [474] holds meetings and did then periodically. It has one every quarter now. It may have been more often then, I am not certain. At those meetings industry technological problems are discussed, proposed solutions are discussed; representatives of the University of California, Division of Food Technology, and the University of California, Division of Viticulture, and the United States Department of Agriculture Regional Reserve Laboratory at Albany, California, and other technologists, including independent wine chemists, were present. They were invited then and they are now, to the best of my knowledge invited. The meetings are—were then and are now—open to any interested person, and while the membership on the committee, the technical committee, is limited to twenty-five, I believe the average attendance at most of the meetings ranged upwards of a hundred. Does that answer your question?

Q. Yes, I think it does.

Do you know if Giulio Particelli was ever a member of any of those advisory committees to which you referred?

A. No, to the best of my knowledge he was not.

Q. And you referred during your earlier testimony to the Advisory Committee for the OPA of nine men. Was Giulio Particelli a member of that?

(Testimony of Louis R. Gomberg.)

A. Mr. Particelli was not a member of that committee.

Q. Had you met Mr. Particelli prior to the institution of this proceeding? [475]

A. I am trying my best to recall whether I did or not. I might have talked to him once or twice on the telephone.

Q. Do you recall what the occasion was for those conversations?

A. I have a vague recollection one call pertained to some statistics I was gathering at the Wine Institute in connection with statistical surveys of the Institute which I conducted for the Institute.

Q. Do you remember approximately the year or exactly?

A. It was somewhere in 1941 or 1942, to the best of my recollection.

Q. Mr. Gomberg, you referred to bulletins issued by the Wine Institute as part of the policy of cooperating, I believe, with the OPA, and you said they were prepared by you, as I recall, or at least under your supervision. Were they in Italian or English?

A. English.

Q. How frequently were they issued?

A. Sometimes as often as twice a week; sometimes once every two weeks, but within those periods.

Q. What steps did the Wine Institute take to supply information regarding the contents of the bulletins to its members or vintners who did not read English?

(Testimony of Louis R. Gomberg.)

A. Maybe I'd better break the question up. The first part is what steps were taken? [476]

Q. It is all one question. I am asking if you took any steps, what steps you took for the dissemination of the information in these bulletins for the benefit of the members or other vintners who did not read English?

A. When I first became affiliated with the Wine Institute, in 1936, I soon learned there were quite a number of—my guess is somewhere in the neighborhood of 30 or 40 members of the Wine Institute, who could not speak English. I remember on one occasion we had a letter from one of the members who could not read or speak English, and the letter was apparently written by a relative, and it said, "Please do not send me any more bulletins. It costs me twenty-five cents to get them translated every time." As a result of that, and other similar experiences, we pursued this kind of policy. Lots of the members of the Wine Institute with whom I was in personal contact or over the telephone, could not write or read English, but could speak English, so they would come in to see me or one of my assistants or someone else in the office, or telephone, and we would handle our problem in that way. The answer is we supplemented the bulletins written in English with personal and telephone conferences which enable English speaking and understanding members to understand what was going on.

Q. Did you initiate those telephone conversations? A. They were invited.

(Testimony of Louis R. Gomberg.)

Q. But if the particular vintner who did not read English [477] did not call in, he did not get the information?

Mr. Marcussen: Objection to that as argumentative.

The Court: Overruled.

A. You see the Wine Institute proceeded on the assumption that everybody operating a bonded winery in California either could himself read English, understand it, understand the English langauge, or had someone in his employ with whom he was related to do that job, because far more fundamental than the bulletins of the Wine Institute were the United States Treasury Department's laws and the laws of the state which involved many and complicated requirements for winery proprietors, so I assumed—it was the Wine Institute management's assumption, if the person had to have somebody like that to read the English language for the rules and regulations, he would find somebody like that to read the bulletins.

Q. There was reference in your testimony to the placing of the ceilings on the service of finishing wines, and I think you said the ceiling was 2½ cents a gallon. Was that the first ceiling or a lowered ceiling?

A. That was the first prescribed ceiling. Prior to that time the ceiling was whatever the person charged in March of 1942. Of course, nobody normally was charging a ceiling for finishing wine in March of 1942. It wasn't thought of yet, so up to

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that time the ceiling on finishing wine, up to October of 1943, the ceiling on the service of finishing wine was, let us [478] say, obscure. Beginning, however, with the 22nd of October 1943, it was prescribed in the exact amount of 2½ cents a gallon for dry wine and 1½ cents a gallon for sweet wine.

Q. Do you know whether experience indicated that that price for finishing was equal to or in excess of the cost to the finisher of finishing the wine?

A. OPA made a determination in 1943 which caused them to issue that amount for the ceiling. It is well to bear in mind, Mr. Brookes, that was not the entire operation of converting grapes into wine. That was the last step or steps before marketing of the wine. Before that, you see, the ceiling prescribed, the regulations prescribed an amount representing, as I recall it, 6 cents per gallon for converting the grapes into wine and then an additional 2½ cents a gallon for finishing and the total amount there was 8½ cents, which, in my opinion at least, was quite generous.

Q. 8½ cents?

A. Yes. Six cents for the converting of grapes into wine and 2½ cents for the finishing of the wine.

Q. Separating the finishing process and finishing charge, I was directing my attention and yours to this: Was that cost sufficient to cover the labor costs and the other costs that went into the process of finishing alone?

A. I think that question can best be answered in

(Testimony of Louis R. Gomberg.)

this way: If the wartime methods of finishing wines were involved, yes, [479] I would say that would be ample; if some of the prewar methods, especially those that took great precaution and pains with fine quality wines, to finish the wine, then I would say it probably was not adequate.

Q. Did the application of this ceiling of 2½ cents on the service of finishing have the effect of diminishing the amount of that work that was done for others?

A. I don't think the ceiling did. I think the terrific demand for wine did. I don't think the ceiling played any significant part in that, for this reason: I doubt if very many people ever charged that particular ceiling for finishing wine other than those who were producing wine on contract, contract crushing, to be distinguished from contract bottling. Contract crushing deals were charged for on the basis of so much per ton or gallon to convert the grapes into wine, and then the ceiling of 2½ cents for dry wine, 1½ cents for sweet wine to finish the wine—there was not proportionately a great deal of that. The bulk of the wine moving out to consumers in 1943 consisted of wine that was acquired through purchase of the winery and the wine inventory, or the winery's own operation where there was no sale involved at all, or the contract bottling or franchise bottling.

Q. You indicated there were other factors which had the effect of diminishing the amount of this

(Testimony of Louis R. Gomberg.)

finishing for others. What were the other factors you had in mind? [480]

A. The effect of what?

Q. I asked you if the placing of this low ceiling on this service of finishing had the effect of diminishing the amount of the performing of this service or finishing that was done by one winery for another, and I understood you to reply there were other factors which did that rather than the placing of the ceiling.

A. People buying wineries and inventories with the winery, there would be no service charge there. That is one example, if people who previously had been selling to the bulk trade decided "Let's cash in on this good, high market." They did their own bottling out here if they had or could acquire bottling facilities or shipped to a branch, or acquired a common interest with some bottler in the east, so there would be no service charge at all, and then the third method, the contract bottling method, also served to minimize the use given to the finishing ceiling, because if the winery here had facilities of its own it didn't perform a finishing service for anyone, because the wine belonged to the winery. If the finishing was done by the bottler in the east, he was so grateful to get the wine he made no charge anyway for finishing it.

Q. I understood you to say there were a great many wineries in the Sonoma region and perhaps others that were without facilities for finishing themselves. A. That is correct. [481]

(Testimony of Louis R. Gomberg.)

Q. Assume such a winery attempted to get such wine finished at a neighboring plant that had the facilities for finishing, and then wanted to get it back and sell it under its own labels; I am wondering if the business conditions at the time were such they would have difficulty getting anybody to finish the wine for them, such as a——

A. I don't know of anyone coming to me and complaining they were unable to get a winery to finish it for them. If a winery couldn't do it, they could find a bottler to do it, and there were and are bottlers here in California, just wine bottlers, who have adequate finishing facilities, who would have been, I believe, anxious to get the wine finished or unfinished.

Q. You are referring to the use of the contract bottling method?

A. Yes, by the use of the contract bottling method.

Q. In your description of the process of making wine, I did not hear any reference to seasons of the year, which I understand were of some significance. What are the—do you know what the months of the year are in which the crushing of the grapes and the fermentation of the juice, of the wine, occur in the Northern California wine regions?

A. Yes.

Q. What are those months?

A. In a good season, meaning a season of early maturity, [482] it will start in September. Normally, I would say it is early October, and then it

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continues on, depending on how quickly the grapes are harvested and what the capacity is to accommodate the crush and so on and many other considerations—will carry on into November, the first two weeks, maybe, and occasionally beyond, but the normal period, I would say, is September 15th to November 15th.

Q. Are the grapes ready in the Northern California wine region at all for the making into wine in May or June? A. No.

Q. Mr. Gomberg, you testified to an oral ruling from OPA, obtained by either long distance telephone or telegram approving the contract bottling system, and you testified that you made an inquiry of OPA in October, I believe you said, of 1943, or you may have said October or November, but I didn't understand whether you were testifying what the date was when you obtained this oral ruling approving contract bottling; what was the date?

A. It was in the latter part of 1943. I do not recall the specific day or month. It probably was in the months of October, November or December; most likely in October, because my recollection is that is when my attention was first called to this method of marketing and my practice was to refer to Washington for ruling, to the OPA for obtaining OPA's opinion as to any new matters of importance that arose in connection with my work.

Q. What was the date of the first—the date when you first learned, I should say, of a written ruling approving contract bottling?

(Testimony of Louis R. Gomberg.)

A. Of a written ruling approving contract bottling?

Q. Yes.

A. I have no personal knowledge of a written ruling affirmatively approving contract bottling.

Q. Did you mean that so far as you know the oral ruling to which you referred is the only OPA ruling on that subject? A. No.

Q. I mean so far as your own knowledge is concerned?

A. No, it is not the only ruling.

Q. There were other oral rulings?

A. Yes, I assume you are still talking about this period of 1943 and 1944.

Q. Well, in 1944, was there a written ruling in 1944 to your knowledge?

A. Not to my knowledge. I want to make it clear that does not preclude the possibility that somebody somewhere went into an OPA office and got a written ruling from somebody.

Q. I understand that. I am asking about your knowledge. A. No.

Q. Mr. Gomberg, were the materials for constructing wineries in short supply in 1943?

A. They were. [484]

Q. And in 1944? A. Yes, they were.

Q. Which of the materials were under allocation by the WPB, do you know?

A. I can stop and think of them. Perhaps I won't remember all of them, but I can remember quite a few. Steel, of course, lumber, chemicals,

(Testimony of Louis R. Gomberg.)

bottles, railroad facilities, a good percentage, almost half of all the wine industry's tank cars were removed from wine service and put into wartime service, raisins of course. I referred to that a while ago, and raisin variety grapes too; caps, redwood stakes for vineyards, automotive equipment, of course, tractors, building materials, in addition to lumber—do you want me to go on?

Q. Well, I suppose pipes and pumps and other things such as that? A. Yes.

Q. Quite a list? A. That is correct.

Q. Then, would someone attempting to construct a winery in December of 1943 have been able to construct the winery?

A. Well, it depends on what you mean by a winery. Can you be a little more specific; do you mean the entire operation from begining to end or the building or the equipment?

Q. I mean the entire operation of making wine; not growing grapes. [485]

A. No. What is you question, could he have done it easily?

Q. Could he have done it at all?

A. Yes, he could have.

Q. How?

A. By using used materials; by taking over, for example, an abandoned building or building used as a tannery, for instance, and locate—they were available but weren't easy—locate cooperage and other facilities needed for wine making and then putting that equipment in the building that al-

(Testimony of Louis R. Gomberg.)

ready existed. It could be done and was done in some instances. It required a great deal of resourcefulness by the proprietor of the winery. He had to be on his toes.

Q. Was there a good deal of competition for such used material as went into a winery?

A. There was a great deal of competition, yes.

Q. When you estimated the value of a winery rose from 10 cents per gallon to 15 cents per gallon during the war, were you referring to the increase in the cost of constructing a winery?

A. I wasn't referring to any specific portion of a winery; I was referring to the overall operations, the buildings, the facilities, the cooperage and the equipment. The rule of thumb of 10 cents a gallon included all of those. It wasn't just for cooperage or just for buildings or just for land; the rule of [486] thumb, just as you undoubtedly use rules of thumb in reference to business transactions or professional transactions, similarly this 10 cents a gallon was considered reasonably accurate in round number figures as the market value of a winery in the dry wine district.

Q. Would a winery that had a spur track alongside the buildings be estimated at a value of 10 cents a gallon prior to the war?

A. It could be, yes.

Q. And a winery without a spur track alongside at the same figure?

A. It could be very easily.

Q. Then do I understand this rule of thumb

(Testimony of Louis R. Gomberg.)

means it was strictly that and did not take into account——

A. It was not a refined rule, that is correct.

Q. And that would be true likewise of the increased figure of 15c a gallon to which you refered? A. Precisely.

Q. During the period of the war when, as you testified, wine was in short supply and great demand, did not wineries have a value to people who had not theretofore owned them, to secure their source of supply for the next few years while the shortage continued?

A. They did, yes. They had what might be described as a potential value, not a real value, for the reason a winery with [487] wine in it had something real and immediately liquidatable and empty wineries were merely valuable as a potential facility to produce income or wealth. For example, those who bought wineries in late 1944 or especially in 1946, those who bought or built them lived to regret it, because in both of those years the market diminished, to put it too mildly, diminished, and the purchasers lost a great deal of money.

Q. Then, was it true that the question of the value of a winery during this period, the wartime period, depended a great deal upon the judgment of the individual purchaser as to his own needs and as to the future, rather than upon a rule of thumb?

A. Well, Mr. Brookes, I think the emphasis during that period was all on the inventory. The winery was considered a necessary evil, so to speak.

(Testimony of Louis R. Gomberg.)

Mr. Marcussen: A necessary what?

The Witness: A necessary evil. If a man could buy inventory without buying a winery, he would have done anything to be able to do it, but he just couldn't. It is perfectly understandable, that they wouldn't sell the wine without the winery. I am not saying it was wrong. The winery, with high production costs—the wine could not be sold profitably at OPA ceilings, with an OPA ceiling for bulk wine, and there were a limited number of alternatives a man had. If he could realize on his wine, especially if he could realize at a profit, he is [488] going to do it, provided, of course, he wanted to get out of the industry. A lot of people sold their wine by the contract bottling method. That made the bottler happy. He got his wine. He didn't make as much as if he had been able to buy it in bulk, but that was purely a question of who was going to get that profit, the winery or the bottler.

Q. Mr. Gomberg, do you remember the name of the purchaser of Cresta Blanca Winery?

A. I do, indeed.

Q. Who was it?

A. You are referring now to the purchase by the Schenley Interests in 1940 from Mr. Johnson, who was then the owner of Cresta Blanca—yes, I do.

Q. Who owns the Cresta Blanca Winery today?

A. I can only speak from hearsay. My understanding is that it is a corporation, all of the stock of which is owned by Schenley Industries, Incorporated. I may be in error about that, am I?

(Testimony of Louis R. Gomberg.)

Q. No, you are quite right. I would have been very sorry if you hadn't said that, Mr. Gomberg. Did not National Distillers buy——

Mr. Marcussen: May I ask the reporter to make a note in his notes at this point so I can pick it out.

Q. (By Mr. Brookes): Did not National Distilleries buy a noted winery in [489] California?

A. National Distilleries along about the same time Schenley bought Cresta Blanca, they bought Shewan-Jones at Lodi. Shewan-Jones was a different type of operation from Cresta Blanca, you know.

Q. Yes. And do they still own it, that winery, to your knowledge? A. Does——

Q. Do you know whether National Distillers does or doesn't own that?

A. To the best of my knowledge they still do. They offered it for sale about three months ago.

Q. And do you recall who it was that purchased the Greystone Cellars in St. Helena?

A. Yes, I do.

Q. What was the name of the purchaser?

A. Cresta Blanca Wine Company.

Q. The one to which you referred?

A. The one to which I previously referred, that's right.

Q. Do you know whether it has been sold or not?

A. My understanding is it was sold about, oh, about a month or six weeks ago.

Q. Do you recall when it was purchased?

A. Approximately 1943. I am pretty sure it was 1943. I am not absolutely certain, but I think it was.

(Testimony of Louis R. Gomberg.)

There were so [490] many purchases at that time.

Q. Do you know the use to which Greystone Cellars was put by Cresta Blanca during the period it owned it?

A. I am not certain whether wine was produced there one or more years or not. I do know in the past two or three years it has been used for storage and I am quite sure there has been no production in the last two or three years.

Q. I can only observe, Mr. Gomberg, it took these large corporations quite a long time to get rid of these "necessary evils" and I wonder if you are of the opinion that all the wine purchases and winery purchases are viewed by the purchasers as purchases of "necessary evils," in view of the purchase by Schenley of Cresta Blanca, which it still operates. A. I didn't get your question.

Q. You stated that the purchase of wineries was, in your opinion, a purchase—something that was regarded by the purchasers as a necessary evil, and——

A. Yes, he was in the business of selling wine, not wineries. If he had to buy a winery to get the wine, I think I can say, perhaps with two or three, perhaps with half a dozen qualifications, they would much have preferred to buy the wine without the wineries than with the wineries.

Q. I assume that expression of opinion is based upon personal conversations with all the purchasers?

A. Not all of them, but most of them, that is correct. [491]

Q. I see.

(Testimony of Louis R. Gomberg.)

A. May I ask, in connection with the question about Cresta Blanca, Mr. Brookes, if I completed the answer to your question?

Q. I believe so, Mr. Gomberg, yes.

Mr. Gomberg, I didn't entirely follow you during the answers to Mr. Marcussen's questions as to whether the contract bottling method resulted in increase in the price of wine to the consumer. Understand, I am not asking a question yet, I am trying to explain my own inability to follow you, before I ask the question. I understood you to say that anyone with an established price for wine under a certain brand in March of 1942 was allowed to use that as his setting price; did I understand you correctly?

A. He was allowed to use the March, 1942, ceiling plus the permitted increase, that's correct.

Q. So long as it was sold under that brand?

A. That is correct.

Q. Then, would it not be true that if a producer of wine sold under his own brand on March—in March, 1942, at a low price and thereafter, by virtue of the contract bottling method was able to shift the wine to another brand with a higher March, 1942, ceiling price, that that would result in an increase in the cost of wine at retail?

A. What may I say, Mr. Brookes? If I understood your [492] question correctly, I think you are confused. Perhaps I ought to restate the whole thing and make it perfectly clear.

Mr. Marcussen: Speak a little more loudly if you can, Mr. Gomberg.

(Testimony of Louis R. Gomberg.)

The Witness: Yes. Under the OPA regulations as they existed in October of 1943, a wine processor, meaning a wine producer or wine bottler or both a producer and a bottler, a wine processor could have one of three types of ceilings for his bottled wine. He could have a March, 1942, ceiling, adjusted upwards under that formula that was established in 1942, or he could have a so-called flat ceiling, of which there were two types, one for current wines and one for non-current wines, or he could have what was known as a special price ceiling, and that had to be obtained upon application to the OPA with a showing that this wine was of very fine quality, he didn't have a March, 1942, ceiling for it, or the flat ceilings were too low, not high enough, and therefore he was entitled to a special price ceiling, which was higher than the flat ceiling. Now, my point about there being no difference to the consumer in the price paid for wine, whether it was sold in bulk by the winery to the bottler for bottling, or whether the winery shipped the wine, retaining title, to the bottler and had the bottler bottle it for him under a contract or franchise bottling arrangement, my point was that in either case the consumer paid the same price for the wine, for this reason: that if the [493] winery had sold bulk wine to the bottler and the bottler had used the flat ceilings, the price to the wholesaler or retailer or consumer would have been precisely the same as if the winery shipped the wine to the bottler for the winery's own account, had the bottler

(Testimony of Louis R. Gomberg.)

bottle it for the account of the winery and then sold the bottler the case goods. As a matter of fact, come to think of it, it is entirely probable that the consumer actually paid less for his wine during this war period on account of this francise or contract bottling arrangement than he would have paid had the winery been compelled to sell the wine in bulk at these ridiculously low bulk ceilings, because if the winery had been so compelled to sell its bulk wine, I have no doubt that much of that wine would have gone into the hands of bottlers who had very high March, 1942, ceilings, substantially above the flat ceilings, and they would have channeled the wine out through those higher March, 1942, ceilings and the consumer would have paid even more.

Mr. Brookes: Thank you. I think I understand your answer better, Mr. Gomberg. I am through with this witness.

Mr. Marcussen: Just a few questions, if your Honor please.

Redirect Examination

Q. (By Mr. Marcussen): Do you know what the average crush of wine from a ton of grapes is, as it is used in the industry? A. I do. [494]

Q. What is that?

A. Are you referring to OPA regulations or today's conditions?

Q. No, OPA regulations.

A. Under OPA regulations one ton of grapes produced 80 gallons of sweet wine, or 160 gallons of dry wine.

(Testimony of Louis R. Gomberg.)

Q. Now, do you know whether in 1943 and 1944 there was any active market for wineries alone with no inventory of wine?

A. To the best of my knowledge, no.

Q. Do you know of any such sale?

A. I can't recall any.

Mr. Marcussen: That is all, your Honor.

Mr. Brookes: May I ask one further question.

Mr. Marcussen: Certainly.

Recross Examination

Q. (By Mr. Brookes): Mr. Gomberg, do you know whether after the crushing season of 1943 there was in California a winery that did not have an inventory of wine in it?

A. My recollection of the statistical survey that I made in 1943—and, mind you, this is all hazy—is that it was no different from any other year when there were always a few wineries without any wine in them. There were always a few and I think I would have remembered if there were no wineries without inventories at the end of 1943. I don't remember that. [495]

Q. What is the cause for there being some wineries not in operation at any time?

A. I am afraid the answer would be pretty complex. For instance, a man is getting old, he has to give up; he doesn't produce; he has sold everything he has, or he may have had financial difficulties and wasn't able to borrow from the bank so he couldn't buy any grapes, so the winery is empty at the end

(Testimony of Louis R. Gomberg.)

of the year. There isn't any single condition I know of that might cause it.

Mr. Brookes: Thank you.

Mr. Marcussen: Thank you, Mr. Gomberg.

(Witness excused.)

* * * * * [496]

Whereupon,

GIULIO PARTICELLI

was called as a witness on behalf of the Petitioner, and having been previously duly sworn, testified as follows:

Redirect Examination

Q. (By Mr. Brookes): Mr. Particelli, in the Lucca Winery, did you have any casks or barrels made of oak? A. Yes.

Q. Do you recall how many gallons your oak containers would hold?

A. Oh, between 18, 20 thousand.

Q. Do you recall how many barrels of oak, casks, you had?

A. No, I don't remember the number.

Q. During the year 1943, did you sell any sweet wine? A. Yes.

Q. Did you hold them in bond before selling?

A. Yes, I have some in bond.

Q. Do you remember how many gallons?

A. No, I just remember between 20 and 25——

Q. Gallons? A. ——thousand gallons.

Mr. Marcussen: When?

The Witness: I don't remember if it was later in 1942 or early in 1943.

(Testimony of Giulio Particelli.)

Q. (By Mr. Brookes): You said you did not remember whether it was late in 1942 or early in 1943? A. Yes.

Q. Did you mean you did not remember whether you sold sweet wine in late '42 or early '43?

A. I remember '43 when I sold the winery, no more sweet wine.

Q. Do you remember if you had any sweet wine on hand at the begining of 1943 for sale?

A. Yes.

Q. You did? A. Yes.

Q. And when you said you estimated between 20,000 and 25,000 gallons, did you mean that was —you thought that was the amount that you sold in 1943?

A. Yes, that is the total amount of gallons I bought in [498] bulk, we moved to another winery from my winery in bond.

Mr. Marcussen: Tax paid in bond?

The Witness: Without any tax paid.

Q. (By Mr. Brookes): In the Lucca Winery, did you have any chilling equipment?

A. No.

Q. Do you know of any sales of empty wineries, by that I mean wineries without wine in them, that occurred in the neighborhood around where you lived?

A. Not in Forestville; a couple in Healdsburg.

Q. Do you know when those sales occurred?

A. Oh, I don't remember; it was in 1941, 1942, or 1943.

(Testimony of Giulio Particelli.)

Q. Would you estimate that it was in one of those three years?

Mr. Marcussen: Objection to that, if your Honor please.

The Court: I will overrule it.

Q. (By Mr. Brookes): Are you certain that those wineries had no wine in them when they were sold?

A. No wine, no tank, in one especially, no.

Mr. Marcussen: And no what?

The Witness: No tank. In one especially the winery sold was completely empty. [499]

Q. (By Mr. Brookes): At any time did you have any other winery finish any of your wine for you?

A. I had Geyserville Growers finish for me once. After they finished me some and I asked if they finish more, they say they have no time, they have no place.

Mr. Brookes: That is all, your Honor.

Recross Examination

Q. (By Mr. Marcussen): Do you remember on your direct testimony yesterday, Mr. Particelli, when you were asked about the cooperage in your winery you spoke about redwood only. Why is it that you didn't mention the oak casks then?

A. I don't remember that I said redwood only. I don't understand, because I have between 18 or 20 thousand gallons oak.

(Testimony of Giulio Particelli.)

Mr. Brookes: Counsel, I can clarify that if you will let me examine him.

Mr. Marcussen: Very well, Mr. Brookes would like to clarify that. I will yield to him.

Mr. Brookes: Mr. Particelli, what did you use the oak casks for?

The Witness: I used the most of it for the old wine.

Mr. Brookes: Did you use them for fermentation vats?

The Witness: No. [500]

Mr. Brookes: Did you use them for storage?

The Witness: Yes.

Mr. Brookes: What materials were your fermentation vats constructed from?

The Witness: Redwood.

Q. (By Mr. Marcussen): What was the total capacity of your winery?

A. I'd say it was between 200 and 275, 270, 275—I can't remember.

Q. In storage tanks? I am not including fermentation now; I am including the storage tanks only.

A. Storage tanks, I think about 250—I can't recall. I don't remember exactly.

Q. Would it refresh your recollection to have me tell you that in December, 1943, when you made the sale to Tiara you had 256,000 gallons stored at your winery, and then you had 19,000 gallons stored at Scatino Winery. What was the reason for having that wine stored at Scatino?

A. Because most of my storage tanks were full.

(Testimony of Giulio Particelli.)

Q. Now, when you said that—did you say that you had purchased sweet wine? A. Yes.

Q. And you mentioned a figure, I think, or your counsel did, I guess it was you, of 20 to 25,000 gallons? A. Yes. [501]

Q. What did you do, purchase that all at once?

A. Yes.

Q. And you can't recall what year that was in?

A. 1941—I can't recall if it was 1942 or 1943—yes, in 1943.

Q. You don't know which one of those three years, as I understand your testimony?

A. Two years.

Q. You mentioned 1941 on your direct testimony, if you will recall.

A. I didn't buy the sweet wine in 1941. It was 1942 or 1943.

Q. And did you buy that—what was the purpose of buying that?

A. I didn't buy it, I trade some for dry wine?

Q. Whom did you trade it to?

A. Trade it to Garden Winery in Fresno.

Mr. Brookes: Gallo?

The Witness: Garden Winery.

Q. (By Mr. Marcussen): Is that an Italian name? A. No, it is not Italian name.

Mr. Gomberg: G-a-r-d-e-n. It is just the other side of Fresno.

Mr. Marcussen: May it be stipulated that Mr. Gomberg [502] has informed both of us that it is the Garden Winery?

(Testimony of Giulio Particelli.)

Mr. Gomberg: Garden Vineyard and Winery.

Mr. Marcussen: Yes, at Fresno.

Mr. Brookes: So stipulated.

Q. (By Mr. Marcussen): What did you do with that wine when you purchased it?

A. I sell it.

Q. How soon after you got it?

A. I put it in my winery in bond and every time I drew 50 gallons, a hundred gallons, I put the stamp and take it to my bottling place.

Q. How many gallons of red wine did you give for that, or dry wine? A. I give two for one.

Q. Two for one? A. Yes.

Mr. Marcussen: That is all.

The Court: That is all.

(Witness excused.)

* * * * *

Whereupon,

LOUIS R. GOMBERG [503]

was called as a witness on behalf of the respondent, and having been previously duly sworn, testified as follows:

Redirect Examination—(Resumed)

Q. (By Mr. Marcussen): Toward the close of your cross examination, Mr. Gomberg, I believe you testified concerning the disposition of some of these wineries that had been purchased by some of the bottling interests. I believe you mentioned National Distillers—and will you refresh my recollection of what others you mentioned?

A. Mr. Brookes asked me about Cresta Blanca

(Testimony of Louis R. Gomberg.)

Wine Company at Livermore and the so-called Greystone Cellars at St. Helena and Shewan-Jones at Lodi.

Q. And would you refresh my recollection also as to what you testified to concerning the sale, the date of resale by those parties?

A. I made no reference to resale of the Cresta Blanca Wine Company at Livermore.

Q. What was your testimony?

A. I said that the Shewan-Jones plant at Lodi was put up for sale a month or two ago and I made no reference, that I recall, to the resale of the Greystone Cellars but it is a fact that the Greystone Cellars were sold—yes, I beg your pardon, I did—a month or six weeks ago.

Q. Now, with respect to those other interests, do you [504] know whether they made any effort to sell those wineries that they had purchased with stocks of wine? A. I do.

Q. And when did they make an effort, do you know that, to sell those wineries?

A. Well, do you wish me to limit the answer to these particular firms and plants or do you want me to——

Q. At the present time?

A. To the best of my knowledge Cresta Blanca Wine Company has not actualy tried to sell Cresta Blanca Winery at Livermore, but Greystone Cellars, I am informed by the assistant sales manager of Roma Wine Company or CVA Corporation, which is affiliated with both Roma Wine Company

(Testimony of Louis R. Gomberg.)

and Cresta Blanca Wine Company, that it has been for sale for several years. The Shewan-Jones plant was abandoned by National Distillers approximately a year ago. It was leased at that time and then about a month or six weeks ago it was offered for sale.

Q. Now, with respect to the wineries in general that were purchased by bottlers during this period of stress in 1942, 1943 and 1944, can you state, do you know, whether any effort was made to resell those wineries? A. I can say, yes.

Q. Will you give that information to the Court, and particularly with respect to the time at which that occurred?

A. I would say that roughly two-thirds of the wineries [505] that were purchased during this period of acute shortage, in 1942, 1943 and 1944, have been offered for sale, sold or resold at various times since 1945, both mostly since 1947. For example, the Roma Wine Company, which is a subsidiary of Schenley Distillers Corporation, now known as Schenley Industries, has sold, offered for sale, or terminated the leasing arrangements for winery properties at Livermore; that is, in addition to the Cresta Blanca property they also leased another plant there. That lease was terminated about two or three years ago—at Healdsburg—at St. Helena, that is the Greystone Cellars that was just sold about a month or six weeks ago. They dismantled and abandoned the former Colonial Grape Products Company at Elk Grove, California, about three years ago. They have never rebuilt the cellars

(Testimony of Louis R. Gomberg.)

known as Manteca Winery, at Manteca, California, after it was partially destroyed by fire three or four years ago. That makes five out of about nine or ten properties that they have either sold, offered for sale, or failed to rebuild after partial destruction by fire over the last three or four years. That is in the case of Roma. In the case of National Distillers they purchased altogether four winery properties in California; the so-called Paloma Winery near Fresno, the Asti plant, that is the primary premises of Italian-Swiss Colony. The Shewan-Jones plant at Lodi and the former Solano Winery at Cordelia, California. They sold the Cordelia plant about eight or ten months ago. They had it on [506] the market for three years or thereabouts, and as I testified a little earlier they leased Shewan-Jones' plant last year and now have offered it for sale within the past sixty days. They still retained the Fresno and Asti premises.

Q. Now, do you know generally with respect to the other wineries that were purchased during this period whether many of them were offered for sale or how many of them were offered for sale; do you have any information about the others?

A. As to the disposition of the wineries that were purchased during the winery period, yes. The Elk Grove Winery at Elk Grove, which was acquired by Tiara Products Company and was disposed of about a year or a year and a half ago, according to my best recollection; the Bradford Winery at Bradford, California, which was dis-

(Testimony of Louis R. Gomberg.)

posed of about two years—no, three years ago.

Q. Do you know when that was purchased?

A. That was purchased in 1945 or 1946.

Q. I am referring to wineries that were purchased in 1942, 1943 and 1944. You mentioned some. I think you estimated sixty or so.

A. Fifty or sixty had been purchased at that time, yes. In some instances there have been two, three or four changes in ownership since that time, since the original purchase. For instance, the Solano Winery was bought originally by a group of eastern bottlers in early 1943. It was resold to another [507] bottler in 1944, and then another bottler in 1945, and then Italian-Swiss acquired it in 1945 or 1946, and then put it on the market about two and a half or three years ago, shortly after they bought it. They had it one year. I think the best answer I can give to that is that, yes, there have been many resales, sales by bottlers who acquired wineries during the scarcity period. Some are still retained by those bottlers. I would say that in the main those that are still retained are being retained by bottlers for the reason that when they bought they did not buy necessarily as a war measure. They bought as a long-range investment in the industry. There were some of those sales, but they were in the minority.

Mr. Marcussen: That's all.

Recross Examination

Q. (By Mr. Brookes): Do you recall, Mr. Gom-

(Testimony of Louis R. Gomberg.)

berg, when National Distillers bought the Italian-Swiss Colony plant at Asti?

A. I believe I do recall that, yes.

Q. What year was that?

A. I believe it was early 1943.

Q. You testified, according to my notes, that by the close of 1944 over half of the industry volume had been sold—wine industry volume, measured in terms of wineries?

A. No, measured in terms of gallonages.

Q. Gallonages in the wineries had been sold to either [508] bottlers or distilleries. Perhaps there is no distinction between the two in the wine business. Did I understand your testimony correctly?

A. Not exactly. I said that in my opinion over half of the volume of the industry was represented by sales of winery properties in the period 1942, 1943 and 1944 and a little bit in 1945, yes, that is substantially correct, in my opinion.

Q. Does that have any relation to the statistics that were read from time to time that some percentage figure which is over half—and I don't remember—of the California wine industry is controlled by eastern distillers?

A. That has some relation to the statistics but that happens to be an inaccurate statement of the facts, Mr. Brookes?

Q. What is the fact?

A. The fact is this, and this is my recollection of three studies of the extent of distiller participation in the wine industry that I made for the Insti-

(Testimony of Louis R. Gomberg.)

tute at the request of the Federal Trade Commission and the Department of Justice in 1945, 1946 and 1947, I believe were the years. The aggregate holdings of the distilling interests in the wine industry in California as of those times, which represented the peak of their holdings, was in the neighborhood of one-third of the wine industry's facilities in California. That was at the peak of their holdings. Today I would say that that percentage is down to perhaps 25 to 28 per cent. [509]

Q. In terms of gallons of productions?

A. In terms of storage capacity.

Mr. Brookes: Thank you.

Mr. Marcussen: That is all, Mr. Gomberg. Thank you very much.

(Witness excused.)

Mr. Marcussen: Mr. Gould, please.

Whereupon,

GLENARD GOULD

was called as a witness on behalf of the Respondent, and being first duly sworn, testified as follows:

Direct Examination

The Clerk: State your name and address, please.

The Witness: Glenard Gould, 709 Financial Center Building, Oakland.

Mr. Brookes: Is that your residence?

The Witness: No, my residence is 266 Lenox Avenue, Oakland, California.

Mr. Marcussen: At this stage of the trial, I

(Testimony of Glenard Gould.)

think a little banter is permissible.

The Witness: Yes, I think so.

Q. (By Mr. Marcussen): What is your occupation, Mr. Gould?

A. Internal Revenue Agent.

Q. Briefly, what are your duties as an Internal Revenue [510] Agent?

A. To examine all types of returns, to verify they are correctly stated from the taxpayers' records and other information necessary.

Q. Did you make an investigation into Mr. Particelli's income tax liability for the year 1943?

A. I did.

Q. In the course of that investigation, did you have occasion to talk to Mr. Particelli?

A. I did.

Q. Can you recall approximately when that was? A. Approximately April 17th, 1945.

Q. Did you see him on any other occasion?

A. I did not.

Q. Did you have a conversation—did Mr. Particelli tell you anything about the possibility of repurchasing his winery?

A. During the course of conversation, yes.

Q. What did he say?

A. Particelli informed me that if he cared to go back into the business he could purchase the winery for less than $50,000.

Q. What year was that?

A. That was in 1945, when I talked to him.

Q. Did he identify the year in which he could

(Testimony of Glenard Gould.)

have made that purchase? A. He did not.

Q. I hand you Respondent's Exhibit V for identification and ask you to state what that is.

A. It is a copy of a letter that was made out to Mr. Francis M. Passalacqua, Attorney at Law, Healdsburg, California, from the Office of Price Administration, dated April 6, 1944.

Q. And can you tell me where this came from?

A. Yes, it came out of—I had it copied from an original that was in the files of Mr. Arthur A. Hartman, Certified Public Accountant, Santa Rosa, California.

Mr. Marcussen: If your Honor please, counsel has stipulated this may be introduced in evidence. It is a letter dated April 6th, 1944, to Mr. Passalacqua from the Office of Price Administration, and it is a ruling concerning the sale of wine in connection with the sale of a winery. Now, I will put that in evidence as Respondent's Exhibit V.

The Court: Admitted as Exhibit V.

(Whereupon, the document was marked for identification as Respondent's Exhibit V and was received.)

Q. (By Mr. Marcussen): Where did you talk to Mr. Particelli, do you recall?

A. Yes, his new home that he was building in the Rincon Valley near Santa Rosa.

Q. Did you go to his—did you ask him for his records? [512]

A. I did.

(Testimony of Glenard Gould.)

Q. And what did he tell you?

A. He informed me that his records had been destroyed by fire.

Q. Did you make any effort to obtain any other records he might have had?

A. Just what do you mean?

Q. Well, did you go to his store or did you go to any other place to find his books?

A. He referred me to Arthur Anderson Company, that they may have something that would—that I could work from in the nature of records.

Q. And did you go there? A. I did.

Q. Whom did you talk to?

A. I think on the first occasion, Mr. Mencoff.

Q. And did you see any books on that occasion?

A. I did.

Q. Did you talk with anyone else there?

A. Yes, I later talked to Mr. Oefinger with regard to the case.

Q. Did Mr. Mencoff or Mr. Oefinger provide you with a so-called day book that Mr. Oefinger testified to the other day? A. They did.

Q. Did you examine that book? [513]

A. I did.

Q. What else did you do?

A. I took a transcript by page of the various items in it.

Q. Do you have it with you now?

A. I do.

Q. I have had the two pages you handed me stamped for identification as Respondent's Exhibit

(Testimony of Glenard Gould.)

W and I ask you whether this is a complete transcript of all of the figures in the book or whether it purports to be a transcript, a summery of the totals in each of the accounts?

A. Those are only totals in each of the accounts.

Q. Is there anything on these pieces of paper, the two sheets, which did not appear in the book?

A. There is not.

Q. I notice on the second page, in the lower righthand corner, there are a few items. Is that just a continuance?

A. The one item in here happens to be grape boxes which refers back to a former page, and for my own information, to determine—I wanted to know the date when they were purchased, to ask someone, and I made that notation there.

Q. Did this, therefore—you say this is a correct transcript, then, of the accounts in that book?

A. That pertained to the income tax returns. If there were any others, I did not take a transcript.

Q. What do you mean any others?

A. I do not recall if there might have been any figures in the back of the book that did not pertain to the income tax returns. My recollection is this is all there was in the book.

Q. Yes. Your purpose was, your purpose in getting these figures——

A. My purpose was to have a record that would tie in with the figures as submitted on the return.

Q. Well, was it your purpose to take down all the income and special items pertaining to the year

(Testimony of Glenard Gould.)

1943? A. That is correct.

Q. And did you do that? A. I did.

Mr. Marcussen: If your Honor please, I would like to have this in evidence as Respondent's Exhibit W.

Mr. Brookes: Your Honor, I wish to object to the offer. There was an audit going into several issues of tax liability, of which three out of four could be settled by stipulation. I have stated them before, so I won't repeat it again. There is only one issue remaining in the case, and that document obviously is of no relevance to that issue whatsover. The contents of the document, what figures appear there, have nothing whatsoever to do with whether the government can allocate some of the sale price of the winery to the sale of the wine.

Mr. Marcussen: Respondent is not introducing this [515] exhibit at all with respect to any issues which have been stipulated in this case. This is for the purpose of providing the information contained in books which the petitioner has testified were destroyed and which have been identified as the books of account which pertained to the year 1943. That is the taxable year here in question and I also explained to your Honor in connection with the other evidence that was introduced on behalf of respondent that it is necessary for respondent to have this information in order to make a computation, to present to your Honor on brief, to show that there were other sales during the year, must have been

(Testimony of Glenard Gould.)
other sales during the year at higher than ceiling prices.

Mr. Brookes: Your Honor, the question of whether there were sales during the year at other than ceiling prices, by which I assume counsel means above ceiling prices, is obviously something that counsel is not entitled to prove in this case. He is not entitled to prove any taxpayer has been guilty of a crime not involving the Internal Revenue Code, and in the determination of a tax case—there is no evidence he has been indicted, tried, acquitted or convicted of a violation of any maximum price regulation, and the fact is he has been none of those things and counsel is now trying to find him guilty of a crime.

Mr. Marcussen: No, I will state for the record that it is not respondent's purpose to find him guilty of a crime. [516] The purpose is to impeach Mr. Particelli, who testified that he didn't want to ever sell over ceiling prices and that he never did sell and this information will demonstrate clearly that he did, and that is the only purpose of the offer. The OPA penal provisions are all dead as far as I know, and I don't think the petitioner could be prosecuted and there is no purpose to lay a foundation for prosecution, if it were possible.

Mr. Brookes: But you are attempting to prove him guilty of a crime, and I might add that the suggestion that this letter will prove whether or not he did sell over ceiling prices is ridiculous.

(Testimony of Glenard Gould.)

Mr. Marcussen: Then it ought to be put in the record.

Mr. Brookes: He testified there was a wide range of prices, I think he said it went up to $1.40 a gallon and his lower priced wine, he said, and his daughter testified likewise, ranged between 32 and 42 cents a gallon when sold in bulk lots, tax included, and that was during the period of 1943, and as Mr. Gomberg has so eloquently testified the price controls varied from case to case and practically from bottle to bottle. They depended, in the first place, upon March, 1942, ceiling prices of wine and this taxpayer was selling wine in March, 1942, the wine of the Italian-Swiss Colony and others whom he represented, and so I think that this document cannot possibly prove what counsel says, and if it did prove what he is trying to prove it would, I repeat, be an effort to prove him guilty of a [517] crime and thereby impeach his testimony.

Mr. Marcussen: If your Honor please, there has been no testimony here that petitioner had any ceilings for bulk wines in the spring of 1942. In order to have done that, he would have had to have produced in 1941, and there has been no evidence he produced in this winery in 1941. Besides, it seems to me that as a matter of argument these figures are available to respondent as well as they would be—I beg your pardon, to petitioner as well as they would be to respondent, and if there are any inaccuracies, they may be equally demonstrated by petitioner upon brief.

(Testimony of Glenard Gould.)

Mr. Brookes: Your Honor, it must be apparent I was under no obligation to prove the ceiling prices of this petitioner with respect to every type of wine he sold. I did not do so. The record does not contain that information. Unless it contained that information this could not tend to prove what counsel is attempting to establish in any event.

The Court: Well, I think the general rule as to evidence in impeachment, where it might involve criminal conduct on the part of the witness is whether he has been convicted of a crime; not whether he has been indicted for a crime, whether he has been convicted of a crime. That would be evidence in the way of general impeachment. Now, I don't know, it seems to appear here from the statement of petitioner's counsel that this might be more or less confirmatory of petitioner's testimony [518] here as to certain sales he made of wine and different prices—I don't know. I doubt very much the probative effect of it for impeachment purposes. In other words, even if it were admitted, I don't know if it would have very much weight for impeachment purposes, but it is not competent to impeach, generally, by showing certain acts of the witness for which he has not been convicted of a crime.

Mr. Marcussen: That is not my purpose, if your Honor please. The petitioner testified that in connection with this same transaction in 1943, in December, to Tiara Products Company, that he inquired as to what his ceiling prices were and that it

(Testimony of Glenard Gould.)

was his intention to stay at the ceiling prices. He also testified that he had never sold over ceiling prices, and petitoner must have found it to his advantage to offer that testimony to this court to sustain the valuation that he placed upon his wine in December of 1943. Now, this record, which is a record of income and expense and deductions for the very taxable year in question will, I assure your Honor, provide the information whereby we will be able to demonstrate beyond peradventure of a doubt that he sold his 1942 crush, which was some 100,000 gallons, at $70—I beg your pardon, at 70 cents a gallon. We can compute that, and it seems to me that is information which ought to go into this record and that petitioners themselves have presented testimony here which we desire to rebut with this exhibit. [519]

Mr. Brookes: Your Honor, I do not recall having asked any witness whether he made a sale over ceiling prices. I don't think I would have made such a mistake. I know what the issue in this case is, and I also know that I would be very silly to try to trap my own clients in a controversy involving a criminal possibility.

Mr. Marcussen: I will suggest the possibility that it came out on cross examination, and I don't care whether it was by cross examination or by the petitioner on direct examination, but it seems to me it is very material to rebut his testimony and that is the reason it is offered, if your Honor please.

Mr. Brookes: Your Honor, you recall you al-

(Testimony of Glenard Gould.)

lowed respondent's counsel a very wide range in questioning, frequently over my objections. There are undoubtedly matters appearing on cross examination which would open up—might even open up the entire past life of this taxpayer, and it could open up—similar latitude could open up the past life of every taxpayer who comes into the Tax Court, and then, once it is brought up on cross examination, becomes a general inquiry as to whether they may or may not have offended the criminal laws of the country.

Mr. Marcussen: I have no such purpose whatsoever. I shall not press criminal prosecution at all or criminal violations on brief. That is not, I state, the government's concern. This [520] merely is a basis from which—it is needed to impeach the witness' testimony that he sold only at ceiling prices and not above that price, and I submit we are not attempting to open up his entire past life but merely the year 1943. I want to put into evidence the records of his business transactions which are material to this very case we are determining, his tax liability for this very year, if your Honor please, and I submit that ought to go into evidence.

Mr. Brookes: May I illustrate my point with a hypothetical case. Counsel might very well ask a question of a witness whether he had ever committed arson, and then an answer would naturally come out no, and then in this manner he would attempt to prove he had committed arson.

(Testimony of Glenard Gould.)

Mr. Marcussen: Not by books, you can't prove it by books.

Mr. Brookes: By any manner, Counsel.

The Court: What does this represent? You said it represented the totals?

The Witness: The records of the taxpayer from which the income tax return was prepared; the income tax, the totals used upon the income tax return, are reflected, your Honor, in each of these totals that are here, and nothing else.

Mr. Marcussen: Every one of those figures will tie into the income tax return for the taxable year involved in this proceeding. [521]

The Court: Well, what do those totals show, what do they represent?

The Witness: For instance, here on page 2 it shows wine purchased from Roma, $6300; wine purchased from Sonoma, $21,000-odd dollars; page 4, Italian-Swiss Colony, $10,700; page 5, Beer Consumers Bottling Company; page 6——

The Court: Those are purchases?

The Witness: Those are purchases which make up the outside purchases that the taxpayer claimed per his return by adding the item on page 23, stamps, $10,238; making the total that the taxpayer claimed in his cost of goods sold by adding thereto the inventory figure at the beginning of the year and taking from that the inventory figures at the close of the year. The other figures on there represent the expenses that are claimed per return.

Mr. Marcussen: As deductions.

(Testimony of Glenard Gould.)

The Witness: As deductions from the gross income.

The Court: What evidence is there as to whether he sold at or above or below ceiling price?

Q. (Mr. Marcussen): Did you make a schedule of that? A. I did.

Q. Do you have that with you?

A. I do. I used a schedule by taking the total sales and from that taking, your Honor, the amount that was allocated for [522] the sale of the wine, or the $77,000, and came down to the total that would have been their other sales. I then took the cost of goods sold and eliminated the grape purchases from that, which had been agreed upon, and what they claimed as labor, which included a $10,000 bonus, to arrive at the cost of the merchandise that was sold other than the winery and wine sales.

Q. In December of 1943?

A. In December of 1943. I then allocated to—took the purchases, the outside purchases that he claimed for Roma, Italian-Swiss Colony and so forth, and to that I allocated a mark-up of better than 50 per cent and added thereto the cost of the bottles and supplies that were used and arrived at a sales price of the wine that would have had to have been sold in bond. His books show that he has——

Q. What was that price you arrived at?

A. In this computation I arrived at a sales price of $107,243.

Q. You mean per gallon——

(Testimony of Glenard Gould.)

A. Wait a minute.

Q. Excuse me.

A. He showed that he had purchased $10,238 worth of stamps. He had testified that the majority or all of his sales had been dry wine. Dry wine took a stamp of 10 cents per gallon. By multiplying the 10 cents per gallon to the $10,238, I [523] arrived at a total sale of 102,380 gallons that must have gone through the winery from those sales. Dividing the 102,380 there, I came to a figure of 94c a gallon. I recomputed that after the testimony of the accountant yesterday that part of those sales or the part that had been reported as sales constituted accounts receivable from a prior year. I, therefore, took only—and recomputed this on the same basis, the amount that showed in their books as total receipts to the end of September, in the amount of $136,750. I reallocated this, taking out on the same basis the cost and adding the profit that would normally be attributed to that, taking from those sales the $10,000 worth of stamps and I arrived at a figure of 69½ cents per gallon, approximately.

The Court: What year?

The Witness: 1943.

The Court: I will overrule the objection. It may be admitted.

(Whereupon the document was marked for identification as Respondent's Exhibit W and was received.)

(Testimony of Glenard Gould.)

Mr. Brookes: May I have an exception, your Honor?

The Court: You may have an exception.

Mr. Marcussen: That is all.

Mr. Brookes: I have no questions.

The Court: That is all.

(Witness excused.)

* * * * *

[Endorsed]: T.C.U.S. Filed June 19, 1950.

Tax Court of the United States

Docket Nos. 25439, 25440

June 1, 1950, 11 o'Clock a.m.

Bank of Sonoma County, Sebastopol, California

H. L. HOTLE

called as a witness in behalf of the Petitioner, being first duly sworn by the Notary Public George Carlisle, Sebastopol, California to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination

Q. (By. Mr. Brookes): Will you state your name?

A. H. L. Hotle, H-o-t-l-e.

Q. What is your occupation?

A. President, Bank Sonoma County.

Q. Where do you reside?

A. 750 High Street, Sebastopol.

(Deposition of H. L. Hotle.)

Q. How long have you been associated with the Bank of Sonoma County.

A. '29—21 years.

Q. Mr. Hotle, I hand you the Exhibit B-2 which has been placed in the record of this case by stipulation, and I call your attention to the fact it is addressed to the Bank of Sonoma County. At the foot of the letter is the acknowledgment of it, receipt for the bank, signed "H. L. Hotle, President." A. Correct.

Q. I want to ask you whether you recall having seen the original to that document?

A. I have.

Q. Was your signature the one which was appended to it? A. That is correct. [2]

Q. Then I ask you to examine the stipulated Exhibits C-3 and D-4, also addressed to the Bank Sonoma County, and state whether your signature is the one which appears on the original of those documents?

A. (Documents examined by witness) That is correct.

Q. And D-4 as well. A. That is right.

Q. Did the bank then act as the escrow agent to the sale by Mr. Particelli to the Tiara Products Company of the Lucca Winery and the inventory of wine? A. That is right.

Q. And you acted for the bank as the signer?

A. Yes.

Q. Did you receive any instructions in the matter? A. I did.

(Deposition of H. L. Hotle.)

Q. Do you recall what those instructions were?

Mr. Marcussen: May it be established whether they were in writing or oral?

Mr. Brookes: Withdraw the previous question.

Q. Were those instructions oral or in writing?

A. In writing.

Q. Were they other than these documents which have been identified and which you have examined?

A. No. The documents, in other words, that were turned over to the Internal Revenue Department were the documents which we handled the escrow on solely.

Q. Do I understand, then, that you are testifying that your only instructions were those found in Exhibits B-2, C-3 and D-4, which you have examined?

A. As far as I know, yes. Of course I haven't got the [3] original instructions with me. Those were turned over to you.

Q. These are true copies, Mr. Hotle, of the originals which were turned over by you?

Mr. Marcussen: I will hand you a file which was produced by the bank under subpoena.

(File handed to witness by Mr. Marcussen. Witness examines the file.)

The Witness: That is right. These were—In other words, these instructions which are included here were the instructions under which I operated in connection with the completion of the escrow and the amendments that were issued afterwards.

(Deposition of H. L. Hotle.)

Mr. Marcussen: Now, you are just referring——

Q. (By Mr. Brookes): Mr. Hotle, you are referring to the contents of a file which is part of the records of the bank and in the evidence in this case; we have stipulated that these exhibits B-2, C-3 and D-4 are true copies of documents of which the originals are found in your bank file. I would like you to compare them briefly, the copies briefly, with the originals so that you will be satisfied in answer to the question that these are the instructions to which you were testifying.

Mr. Brookes: My question, Mr. Marcussen, is for the purpose of identification only.

Mr. Marcussen: Yes.

(Witness examines documents.)

The Witness: You are starting with A-1, is that correct?

Q. (By Mr. Brookes): A-1 is not one of the instructions to the bank, however, if you have seen an original to A-1, then my question would comprehend that as well. I was referring to [4] B-2, C-3 and D-4, since they are the ones addressed to the bank.

A. All right. December 21st, that is right. B-2 is correct.

Q. Mr. Hotle, I should inform you it is stipulated Exhibit C-3 was later withdrawn and Exhibit D-4 substituted. It is therefore possible C-3 is no longer in your file.

A. What I am going on is, in other words, the ultimate instructions which I completed the deal

(Deposition of H. L. Hotle.)

on. In other words, that would be under D-4 as far as Tiara Products are concerned. Particelli's letter—if I can locate that—December 28th. Where is Particelli's letter of December 28th?

Q. Maybe it follows next in line. A. No.

Q. That is dated under 21st.

A. Wait a minute. That is December 21st. In other words, on the basis of my—We have a letter here of December 28th enclosing a deed from Particelli to Lucca Wine Products delivered upon the basis of $268,000, dated December 28th. That is the letter I don't seem to find here. Maybe I have missed it. Sixth of December, December 21st, December 21st, December 28th. This is the letter from Tiara Products. That is right. December 21st and —and December 21st. In other words, this letter of December 28th does not show in this.

Mr. Marcussen: Isn't it Exhibit D-4? I think we stipulated that the date on that should be December 28th.

Mr. Brookes: Yes.

The Witness: Well, D-4 is right. In other words, D-4 is the letter of instructions I received from the Tiara Products [5] Company. (Reading) "We are enclosing——"

Mr. Marcussen: By the way, while Mr. Hotle is looking that up, Mr. Brookes, I want to say it is my recollection we stipulated in open court that the date on the D-4 was December 28th.

Mr. Brookes: We did so stipulate.

(Deposition of H. L. Hotle.)

Mr. Marcussen: And if we did not, may it now be stipulated?

Mr. Brookes: I will stipulate it again. We have already done so.

The Witness: I am going back on the basis——

Mr. Brookes: Mr. Hotle is referring to the other letter.

The Witness: All of Particelli's instructions, December 28th—(Reading) "We are enclosing grant deed Particelli to Lucca Winery to Tiara to deliver bill of sale now located in the winery for $268,000." We were authorized to place revenue stamps for $110, which is the letter I don't find here. Wait a minute, wait a minute, maybe I have got it here.

Mr. Brookes: This is December 21st.

The Witness: Well, that is it. That is why it didn't tie in. It isn't the same letter, and I don't find this letter in this group of documents which is specifically the basis upon which I closed the transaction, if you follow me.

Mr. Brookes: Yes. Apparently the letter of December 21st——

The Witness: In other words, this letter of Mull's which is this letter, is there under D-4, I think it is.

Mr. Brookes: Yes.

The Witness: D-4. That is dated December 28th. "Enclosing [6] $268,000, and so on." "We have checked the bill of sale," and so on down the line. "The instructions supercede and replace——",

(Deposition of H. L. Hotle.)

signed "Bank Sonoma County." That is correct, but you go back, in other words, to this letter that—This is strictly from Tiara Products on their end of the deal.

Mr. Brookes: Yes.

The Witness: This letter is the sale of the Lucca Winery by Particelli and the instructions, and this is the sale of the wine. Now, I don't know whether we have this one, but I can't find this letter in this group of letters.

Mr. Brookes: It is not there?

The Witness: Now, if you find the other one, maybe—"We are enclosing—December 21st—bill of sale—" That, of course, is not this letter.

Mr. Brookes: But it is this one.

The Witness: Here we are now. This will be——

Mr. Marcussen: In other words, you are referring to Exhibit F-6, a copy of a letter which you now find in the bank file?

The Witness: Yes.

Mr. Marcussen: That is Exhibit F-6.

The Witness: Which is not here.

Mr. Marcussen: F-6 is a true copy of this?

The Witness: Is this F-6? That is correct.

Mr. Marcussen: In the bank file you are referring to another, December 28, 1943, to the bank by Mr. Particelli? It is that letter which you find in your file which you say is not included as one of the letters in the stipulation?

The Witness: I can't find it. [7]

(Deposition of H. L. Hotle.)

Mr. Brookes: Shall we request the witness to read it into the record?

Mr. Marcussen: Let's just look at it.

(Counsel and witness examine the letter.)

The Witness: Practically the same thing, but it isn't the same letter. I can't stipulate to one thing and not find it in the document.

Mr. Brookes: No.

The Witness: You see, the trouble is, naturally the confusion there—Could—Gentlemen, could we go off the record for a moment?

Mr. Brookes: Yes, we will go off the record.

(Off the record.)

Q. (By Mr. Brookes): Mr. Hotle, is it your interpretation of the letter addressed to you, dated December 28th, by Mr. Particelli, to which you referred earlier in your testimony, that it is in substance the same as the stipulated Exhibit E-5, dated December 21, 1943? A. In substance, yes.

Q. Is it your belief that the only change of significance in the later document from the earlier document is in the addition of the instruction to close the deal no later than March 1, 1944?

A. If I ever handle one of these again I will get rid of all the copies. They are very confusing. Now, I am trying to find the document dated December 21st.

Q. That is the one dated December 21st. I don't think you have it in your file.

A. That is right, as compared with the one of December 28th. You are asking if they are rela-

(Deposition of H. L. Hotle.)

tively the same, aside from this [8] license. They are.

Mr. Marcussen: Should we not refer to the actual exhibit?

Mr. Brookes: E-5.

The Witness: E-5. That is in substance, yes, as exhibit dated December 28th, with the exception of the blenders permit.

Mr. Marcussen: You are talking— Exhibit dated the 28th. You are referring not to an exhibit but to another letter in the bank's file, so far not in evidence in this case?

The Witness: That is right.

Mr. Marcussen: And then, do you recall— I don't think there was an answer to your question, Mr. Brookes.

Mr. Brookes: I don't believe there was.

Mr. Marcussen: And I think it might further be brought out by making the suggestion there was this further qualification in the letter, that the bank loan be paid out of the proceeds to Mr. Particelli.

Mr. Brookes: Let's have Mr. Hotle read the letter into the record.

The Witness: Which letter?

Q. (By Mr. Brookes): Would you do that? The letter from Mr. Particelli.

A. (Reading.) "Bank Sonoma County, Sebastopol. Gentlemen: We are enclosing herewith a grant deed, G. Particelli and Eletta Particelli, conveying the Lucca Winery and Lucca Products Company, Inc., together with a bill of sale to all the equipment

(Deposition of H. L. Hotle.)

now located in said winery. You are to deliver these instruments to the above purchaser upon the payment for our account of the sum of $268,000 from which you are to pay [9] all indebtedness due the Bank Sonoma County and Sebastopol National Securities Company, and when I have advised you of the issuance to the purchaser of Wine Producers and Blenders Basic Permit at the Lucca Winery premises, and in any event not later than March 1, 1944. These instructions supercede and replace all of our former escrow instructions relating to the Particelli sale. You are authorized to place on the above deed revenue stamps in the sum of $110. (Signed) G. Particelli."

Q. Do you recall, Mr. Hotle, whether you proceeded in accordance with the instructions in the letter which you just read? A. I did.

Q. Do you recall when Mr. Particelli was paid by Tiara Products Company?

A. You mean when he actually received the cash?

Q. When the payment was made to the bank for his account by Tiara Products?

A. Well, I can't recall exactly when the payment was made by Tiara Products to the bank because we had some difficulty in connection with that payment. We naturally accepted their checks. Those checks were drawn on various New York banks. We immediately sent those checks to be cleared, and we ran into trouble. We had anticipated completing the transaction, and the banks wired us and

(Deposition of H. L. Hotle.)

in some cases that the checks were not paid. We handled the transaction through Chase National Bank in New York, and there were two or three different checks of odd amounts. I think one of them was paid, and I think two of them were not paid. Evidently Tiara Products Company hadn't realized we'd get those checks back as fast as we did, and there [10] wasn't sufficient money in the account, evidently, to cover them. They wired us nonpayment, of course. Then we had to go to work on Tiara Products through Mull, advising them the checks had not been paid and we wanted action. So the deal was held up because of that for a few days, and finally I received a wire from Chase that the checks had been covered. Of course, immediately upon the receipt of that information I was ready to close.

Q. Was that before the end of the year?

A. Yes, on the 31st of December.

Mr. Marcussen: Was the bank held open to get word?

The Witness: No.

Mr. Marcussen: Do you recall?

The Witness: No. In other words, I received word early in the afternoon of the 31st, and I took the papers over myself to the title company in order that it would be expedited. We weren't sure whether we were going to make it or not.

Q. (By Mr. Brookes): Was the credit to Particelli's account made on that day, December 31st?

A. I believe it was. I think the record will indi-

(Deposition of H. L. Hotle.)

cate that. (Witness examines document.) We completed the deal that afternoon and paid off the notes.

Mr. Marcussen: Off the record.

(Off the record.)

Mr. Brookes: On the record, Miss Clary.

Q. Did you, Mr. Hotle—did you receive any oral instructions from the parties?

A. Not that I can recall. There was a considerable amount of discussion at the time these instructions were drawn up as [11] to how they were to be drawn. I don't recall just what took place, but my instructions were purely written, in other words, and those were the instructions I followed and no others.

Q. Did you understand your instructions to be that if Tiara Products before the end of 1943 had only paid $77,000 that you would have been required under your instructions to transfer the wine to Tiara Products? A. If I had the money——

Mr. Marcussen: Before you answer, Mr. Hotle, I wish to interpose an objection on the ground it is leading.

Mr. Brookes: I will withdraw the question. I think it is leading.

Q. Mr. Hotle——

Mr. Brookes: I will rephrase the question.

Mr. Marcussen: I don't mean to infer by that that Mr. Hotle can be led, but for the record I make the objection.

Q. (By Mr. Brookes): Mr. Hotle, what did you understand your instructions to be in the event that

(Deposition of H. L. Hotle.)

prior to the end of 1943 you had received only a check from Tiara for $77,000?

A. My instructions were to close the transaction if I had the money. That was the trouble, I didn't have the money.

Q. But had you received only the sum of $77,000 before the end of the year and the balance not been forthcoming, did you understand that you had any instructions which compelled you to act?

Mr. Marcussen: Just a moment, please, Mr. Hotle. I have an objection that it is an hypothetical question and not based upon facts in the record. The facts show, in other words, a check for $330,000.

Mr. Brookes: Counsel, I know that——

Mr. Marcussen: And for $15,000.

Mr. Brookes: I am trying to get from Mr. Hotle as complete as possible a statement of his understanding of his instructions, and I am trying to meet the government's suggestion that he—which apparently is its case—there may have been some secret instructions inconsistent with the written escrow instructions.

Mr. Marcussen: Well, I am not prepared to say now in a review of all the evidence whether that would be revealed or not. I can say I haven't had that in mind up to this time. I do feel this way: The documents that are in evidence speak for themselves. Mr. Hotle has testified that these were his instructions and they operated under these instructions, and I feel your questions now are asking him, in effect, for an opinion.

(Deposition of H. L. Hotle.)

Mr. Brookes: Do I understand, counsel, that you stated that Mr. Hotle has testified that these documents were his complete instructions and that is your understanding of this last testimony?

Mr. Marcussen: That is my understanding of his testimony. That is the way you intended to be understood?

The Witness: That is right. I operated and completed the deal under those instructions.

Mr. Brookes: Then I will not press my question.

The Witness: No other.

Mr. Brookes: I will withdraw my last question.

Q. Mr. Hotle, had you loaned money to Mr. Particelli over any period of time prior to this transaction? A. Yes. [13]

Q. Do you recall approximately how long a period before this transaction?

A. No, I couldn't say exactly how long. It had been over a period of several years we had loaned him money, oh, in various forms, real estate loans, unsecured loans, prior to— You are speaking prior to this sale?

Q. Yes. A. Yes, that is correct.

Q. Had the bank investigated Mr. Particelli prior to making its loans to him?

A. We had known Mr. Particelli for many years.

Q. Had you had prior business transactions?

A. Yes.

Q. Do you, Mr. Hotle— I will withdraw those words. Did you, Mr. Hotle, at the time of making

(Deposition of H. L. Hotle.)

the loans know Mr. Particelli's reputation in the community? A. We thought we did.

Q. You stated, I believe, that you made among other types of loans, unsecured loans to Mr. Particelli, did you not? A. That is correct.

Q. Would you have made unsecured loans to Mr. Particelli had you not believed that he was a man of good reputation? A. No.

Q. In your experience, your business experiences with Mr. Particelli, have you had the opportunity of forming an opinion of his veracity?

A. Our relations were always satisfactory.

Q. Did you consider him to have a reputation for being a truthful man?

A. As far as we knew. That was our experience.

Mr. Brookes: That completes my examination of Mr. Hotle, Mr. Marcussen.

Examination

Q. (By Mr. Marcussen): Can you tell us more about the unsecured loans, Mr. Hotle; what amounts they were and when they were granted?

A. Well, I can refer to the record, which is probably more accurate than anything I could say. (Witness refers to documents.) If I can get this record in shape— I have here the liability records of Particelli and his relationship with the bank.

Q. May I look over your shoulder at those records?

A. Surely. I don't know where this starts. That is '42. That is '40. That is '38. This is '36. We go

(Deposition of H. L. Hotle.)

back, '40, '42, '43 to '46. In other words, going back to November of 1936. You will note, in other words, that the records caught that. We made certain unsecured loans in that year. Do you want me to bring out the figures? I will. That is up to you.

Mr. Brookes: I have no—Mr. Marcussen, you are examining Mr. Hotle at this point. Do you want those amounts brought out?

The Witness: This is simply the words——

Q. (By Mr. Marcussen): Yes, you might state the dates and what the amounts were.

A. We made him an unsecured loan, December of '36; another one——

Q. What was the amount?

A. $400. Pardon me. Another one March of '37 of $400; [15] another one August 3rd of '37 for $400, and April 12th, '38, a thousand dollars; July 11, $1,000——

Mr. Brookes: Excuse me, July 11, 1938?

The Witness: 1938, pardon me. This doesn't say whether it is unsecured. It is installments. I am assuming it is under those conditions. November 24th, $1300; another one in February of '35, $400. We made an FHA loan—that should be an "A" instead of "S"—April 1st of '35 of $600. That is a secured government guaranteed loan. In June 15th, '36, unsecured of $400; and September 16th, '36, unsecured of $400; on——

Q. (By Mr. Marcussen): By the way, may I ask, are these dates being given in any particular order?

(Deposition of H. L. Hotle.)

A. Well, they are on this sheet. Now, we go from '36, evidently, to '38. We would—November 3, '38—'42——

Q. Well, I think the earliest loan you gave is this one of $1300 in 1934.

A. Wait a minute. Turn that over. What is this? Oh, yes, that's right. I reversed it. It should have been the other way.

Mr. Brookes: Yes.

The Witness: I got one page before the other.

Q. (By Mr. Marcussen): In other words, the loans testified to heretofore have been about entries made on one sheet? A. That is correct.

Q. Both sides of the sheet? A. Yes.

Q. And they have— You have read all of the loans on that sheet, but they have been out of order? [16]

A. They have been out of order, that is correct.

Q. Are there any other loans but unsecured loans on that sheet?

A. Nothing. You can see, aside from FHA, that would be it.

Q. Now, referring to that sheet again, to the loans appearing thereon—Well, I think I will ask no further questions about that. I believe I'd like to have you show me what other records you have showing unsecured loans at later dates, between the dates you have next and 1943.

A. Well, I have those here.

Q. Just show those to me. I think what I would like to do is offer these in evidence.

(Deposition of H. L. Hotle.)

A. All right.

Q. That is the best way of getting the whole picture. A. Off the record?

Q. No, on the record. Well, we will go off the record.

(Off the record.)

Mr. Marcussen: On the record.

Q. Mr. Hotle, you have handed me five sheets—

A. Liability rate ledger.

Q. ——from the liability ledger——

A. Of G. Particelli.

Q. ——of G. Particelli. There are entries on both sides of those sheets. The top side is identified with the letter "A" and the back side with a letter "B". And when you testified concerning unsecured loans you were referring to those sheets, were you not? A. That is correct.

Q. Now, I would like to have you— Strike that, please. The type— This is the exhibit loan ledger on the commercial [17] account?

A. That is correct.

Q. Now, in the early days, at least until '34, until some identified time later, you had, as I understand it, three companies in the business of making loans? A. That is correct.

Q. The loans referred to on the sheets—these five sheets which you have identified—were those made by the Commercial Bank?

A. Up until '39, I believe.

Q. Up until '39. What were the other institutions that were related to the Commercial Bank?

(Deposition of H. L. Hotle.)

A. Analy Savings Bank and the Sebastopol National Securities Company.

Q. What was the name of the Bank itself?

A. Sebastopol National Bank up until '39.

Q. What happened in '39?

A. The banks were all merged together into a state bank called Bank of Sonoma County.

Q. And these five yellow sheets which I have referred to as the liability ledger is pertaining to the liability to the bank of G. Particelli over a period of years?

A. Exclusive of the liability ledger of the Savings Bank at that period of time.

Q. Yes. Now, these sheets, however, continue on showing loans on until 1944 and 1945?

A. That is correct.

Q. Insofar as they reflect the loans for '44 and '45 do they include any other loans made by the other two companies? A. No.

Q. They do not. Even after the merger of the three institutions the loan records of each one were kept separately, [18] is that correct? At least, up through 1944?

A. No, no, that is not correct. After '39 the records were merged. We'd have one liability ledger in the bank at the present time which would consist of all loans of any department.

Q. That is a master control record on any customer? A. That is correct.

Q. But, in other words, even after the merger of the banks you continued to keep separate detail

(Deposition of H. L. Hotle.)

loan ledgers, is that correct?

A. We kept no other record except this except on the notes themselves. In other words, this is the master control record. It still was before we merged the banks, but we had to keep two separate ones. After we merged the banks we only kept one. That is why you find the blue sheet, because it was the Savings Bank at the time it existed.

Q. Well, I call attention to the fact——

A. Exclusive of the Securities Company. It has no connection with these records whatsoever. It is a separate institution, has always been, and has no relationship as far as credits are concerned, with the bank.

Q. When did the merger between the Commercial and Savings occur?

A. I believe '39.

Q. Can you identify the date for us?

A. I can tell you. I can come awfully close.

Q. Specifically.

A. (Witness consults document.) No, February 1940. Beginning March 1, 1940 the three banks were merged by the announcement here. [19]

Q. Now, then, refer again to these five yellow sheets which I have described. I note they contain loan entries and payment entries beginning with November 20, 1934, and continuing until July 20, 1949. Now, will you please tell me what if any difference— Strike that, please. Now, you have handed to me one single liability ledger showing the

(Deposition of H. L. Hotle.)

—on a blue paper—showing the liability of G. Particelli to——

A. Analy Savings Bank.

Q. ——Analy Savings Bank. A. A-n-a-l-y.

Q. That shows loan and payment entries beginning September 3, 1937, and extending——

A. August 22, '41.

Q. By the way, how do you account for this entry in the middle there of August 23, 1942 at the top of the page?

A. Typographical error on the part of the bookkeeper, I am assuming.

Q. It is your opinion that should be '40?

A. That is right.

Q. Now, can you explain with respect to the commercial accounts which are on the yellow sheets what entries were made up until March 1, 1940 on the loan liability account of G. Particelli here, and explain the difference between those entries, if any, and the entries made in his loan account thereafter?

A. Well, the only difference would be that they were kept on separate sheets up until that time, and the total liability ledger of the two sheets would have indicated his total liability to the bank on any specific date.

Q. I see. Well, then, the liability shown on the yellow sheets which represent the commercial account are still only the loans made through the commercial department, are they not, [20] after the merger took place March 1, 1940?

(Deposition of H. L. Hotle.)

A. (Witness consults document.)

Q. In other words, what I am getting at——

A. I know what you are getting at. I am trying to reconcile this.

Q. I think at one time I understood you to say after March 1, 1940 the yellow sheet was the master file and contained the total of all the loans, and so on, through the commercial or savings account. At another time I understood you to say even after the merger separate records were kept, and these sheets, represented by yellow sheets for the commercial and a blue sheet for the savings account, are those separate records.

A. Well, that doesn't tie in because this saving sheet indicates on August 22, '41 he owed $8209.84, and following that—this is August 22nd; this is August 11th—he owed $14,913.90 on the yellow sheet. This is loan 13736 on the blue, and it does not indicate——

Q. Well, that merely refers to an interest payment of seventy-seven fifty. That date doesn't refer to the balance.

A. That is right, no balance paid off there, in September, '41. It does not indicate that those were included—this balance was included in the other sheet. But I don't seem to have a record which indicates how this $8209 was paid off on this sheet.

Q. Would there be other blue sheets?

A. Well, it is possible.

Q. Forwarded to the savings account of 1941?

A. If the— There should have been $8209.84

(Deposition of H. L. Hotle.)

which would have been transferred which does not seem to indicate what was done.

Q. I was wondering whether it would be helpful to ascertain.

A. Let's see if Carlisle can find anything else here.

(Off the record.)

Q. (By Mr. Marcussen): Mr. Hotle, we have had a further conversation about these records, which conversation has been off the record, and you have identified two of the yellow sheets which consist of the liability ledger of G. Particelli to the bank——

A. Sebastopol National.

Q. ——Sebastopol National Bank, showing entries beginning November 20, 1943, to and inclusive February 13, 1940, at which date there was an outstanding balance due from Mr. Particelli of $1,545. Can you state what was done with that balance?

A. That balance was transferred over to the Analy Savings Bank at the time of the merger of the two banks.

Q. Is that the amount that appears here under deposit on the blue sheets?

A. That is correct.

Q. Blue sheet liability ledger of G. Particelli in the Savings Bank? A. At that time.

Q. I understand, then, from what you have just testified that the accounts of the Commercial Bank were taken over by the Savings Bank?

A. That is correct.

(Deposition of H. L. Hotle.)

Q. Then, referring to the same blue sheet, I call your attention to the fact the last entry—rather, the last balance shown is a balance in the $8209.84 under date of August 22, 1941, [22] and I ask you to state, please, what happened to that balance?

A. That balance was transferred, then, over to our liability record on the yellow sheets which were the ones we then were using in the bank, and any savings had been transferred to the Bank Sonoma County. All of our sheets from then on were on the yellow sheets.

Q. You have handed to me three sheets of the original five yellow ones that we have talked about here today, and are those the records of the new bank, that is, the merged bank, or will you please say what they are?

A. Those are the liability ledger records of the Bank of Sonoma County after the merger had taken place.

Q. In other words, the savings bank you had previously absorbed the commercial bank?

A. Yes.

Q. And now was in turn absorbed by another bank, the Bank of Sonoma County?

A. That is right.

Q. Which had both a savings and commercial department?

A. That is right. I might make that a little clearer. It was not an actual merger of a bank. It was simply the changing of the name Analy Savings Bank after we merged all the assets of the

(Deposition of H. L. Hotle.)

other organization—changing that name to the Bank of Sonoma County.

Q. I call your attention to the fact the first two of the three sheets which you have most recently handed me bear the name at the foot of each page "Sebastopol National Bank" and the third of those sheets bears the name "Bank of Sonoma County".

A. The reason simply is we still had those sheets and we used them up. [23]

Q. I think that identifies our records. Now, I would like to ask you a few questions about the symbols on these records.

Mr. Brookes: Don't you want to introduce them before you do that?

Mr. Marcussen: I might do that. I will offer them in evidence at this time as Respondent's exhibit next in order, which I think is AA.

Mr. Brookes: No objection.

(Off the record.)

Q. (By Mr. Marcussen): The first column is the column for the date of the particular transaction identified? A. That is right.

Q. The second column bears the title "Reference". I will ask you to state what that refers to.

A. The number we place on each note to identify it in our work. That number continues on down as payments are made or the loan is paid off.

Q. Do those numbers, different numbers that appear on those columns in all of the sheets we have been referring to—do they refer to specific loans?

A. That is correct.

(Deposition of H. L. Hotle.)

Q. That is, I note here an item on the first of these sheets toward the foot of the page 9,680. That is a loan, a particular loan bearing that particular number?

A. That is correct, and wherever you see the same numbers again later on it is the same note.

Q. Same note and loan transaction?

A. That is right.

Q. Then, the next column bears—top of the column—bears "Maturity Date". It is self-explanatory. Next is "Interest Paid to", and then there are particular dates indicated. Then [24] the next column is for "Interest Payments", and the next column is headed "Type of Loan". I notice there are different symbols used under that heading. Will you please explain? What is the first?

A. "FHA" would indicate Federal Housing loan.

Q. I note that it actually is "FHS". I think you explained that a moment ago.

A. A typographical error.

Q. "Secured loan".

A. Up to ten per cent by the United States Government.

Q. Then "u-n-s-e-c".

A. That is an unsecured loan, secured by no collateral.

Q. The next symbol I note is "r-e-".

A. That means a real estate loan, secured by a deed of trust.

Mr. Marcussen: I beg your pardon?

(Deposition of H. L. Hotle.)

Mr. Brookes: Isn't that a symbol?

The Witness: Merely a designation of that transfer.

Mr. Brookes: I thought it was a symbol when I saw it before.

Q. (By Mr. Marcussen): The next symbol I note is "o-c".

A. Other collateral. That is other than real estate.

Q. Then next I notice the symbols "u-n-s-e-c" with a percentage, figure of five per cent or six per cent behind. I take it that simply is the rate of interest. A. That is the rate of interest.

Q. Now, the next heading on the form is entitled "Principal" and is divided into two subheadings. One—the first of which is "Debit" and the second "Credit". I take it [25] "debits" are the new loans granted? A. That is right.

Q. And the "credits" are the payments?

A. That is correct.

Q. Then the last column is the "Balance"?

A. That is correct.

Q. And is it possible to determine at any one time— Strike that, please. Is it possible to determine what the composition of any particular balance is on any particular day?

A. Not without looking at the individual note itself. That record pertains purely to the total liability of the borrower so we can keep track of it. If we want to determine the individual note we go to the note ledger and pick out that particular note and indicate the balance.

(Deposition of H. L. Hotle.)

Q. The balance indicates the total due on all of the various notes?

A. As of any specific date.

Q. As of any specific date. Can it be ascertained from these sheets which we have before us, which Respondent has introduced in evidence in this proceeding, what part of any balance pertains to any specific loan; that is, whether it is unsecured or a real estate loan?

A. Yes, it is possible. It would be a terrific amount of detail to do it. We don't use it for that purpose.

Q. Yes. Now, from time to time— Strike that, please. On what basis or— Yes, I think that is a good characterization. On what basis did you make unsecured loans to Mr. Particelli?

A. The basis of the financial statement.

Q. Submitted to the bank from time to time?

A. That is correct, plus our own knowledge of his operations.

Q. In other words, I understand your testimony to be that the unsecured loans were made on the basis of the property holdings and net worth?

A. That is right.

Q. Now, I hand you a file which was received by representatives of the Bureau of Internal Revenue under subpoena from the bank, and ask you to state what that file is.

(File handed to witness by Mr. Marcussen.)

A. It is a list of the financial statements we obtained from Mr. Particelli over a period of years.

(Deposition of H. L. Hotle.)

Q. Yes. I note, by the way, that has been identified in the record already as Respondent's Exhibit O for Identification. Now, can you tell me how those statements were made up?

A. Just what do you mean by that?

Q. That is, where did you get your information concerning the items that go to make up the liability and assets appearing on these net worth statements? A. From Mr. Particelli.

Q. And from time to time did the bank check into those statements and verify them?

A. No, not in the sense that we made a check. We had confidence in Particelli. We operated on the basis of a long period of time. We assumed, in other words, that these statements were reasonably correct. We don't in a financial statement depend on the appraisal and value of real estate. For instance, we discount or add to, as the case may be, on the basis of our knowledge of the man. [27]

Q. Yes.

A. We have many statements which may be very misleading, you know, so far as assets. We are chiefly interested in the liability. If we have a knowledge of a piece of property, a man may put it in for a hundred thousand dollars. We may discount it to fifty or increase that on the basis of our own knowledge. We don't divulge it to him. We don't particularly care as long as we know the assets reflect a proper position. After all, the value of a piece of real estate could be fifty things to fifty different people. We have got to use our own knowl-

(Deposition of H. L. Hotle.)

edge on that. We don't question a man when he gives us a figure. It doesn't do anything but create ill will. We have a knowledge of what we are doing; therefore, we use our own basis.

Q. Well, you do confirm in a general way that he owns this particular property?

A. That is correct, surely. In other words, if we were dealing with a man who had just come in to us, a stranger, we naturally would have a complete check before loaning money to him. If we have been dealing with a man for ten or fifteen years, naturally we have pretty complete knowledge of his over-all operation. We know he owns certain property.

Q. And you would be satisfied?

A. We'd be satisfied with his financial statement.

Q. And you would know approximately what allowances to make up or down for the valuation appearing thereon?

A. That would be correct in our judgment.

Q. But the valuation appearing on those net worth statements [28] are the valuation given to you by the loan applicant?

A. I think that is true, although I wouldn't say that would be a hundred per cent true simply because we attempt to keep our appraisals of real property particularly at a very conservative level. We say to a man when we are making a loan, "What do you think your property is worth? Let's cut it down. Let's talk about not what you can sell it for today or tomorrow, but under any reasonably

(Deposition of H. L. Hotle.)

adverse conditions." We are trying to get a statement which will reflect properly his assets, his position at any given time, but we are not buying it or selling it, and we tell him that at the time. We try to prevent him from boosting it clear to the skies simply because the real estate market is active today or tomorrow, because that isn't what we are trying to obtain. We are trying to obtain the fact that if we loan money, under any reasonable circumstance he has the amount to pay off and the amount to secure it. The financial statement doesn't always reflect what the man himself thinks he can sell the property for.

Q. So far as real estate is concerned.

A. We try to discourage that.

Q. Take a conservative valuation?

A. That is correct.

Q. When you discuss valuations you make out this net worth statement?

A. That is right. It is simply for our information and no one else. Naturally we are trying to get a conservative picture.

Q. Do you have any other file pertaining to Mr. Particelli showing any notations of the bank which would in any way modify [29] these net worth statements? A. I don't believe so.

Q. Now, with respect to inventories, what do you do with respect to working out the valuation of inventories?

A. Well, we don't have any set formula. Again it depends upon who we are dealing with. If it is

(Deposition of H. L. Hotle.)

someone we think there is a possibility of dishonesty in we would attempt to make a thorough check of the existence of that particular inventory. If, on the other hand, we had confidence in an individual, had done business for many years, we will take his word for it that he has so many, for instance, gallons of wine or whatever it is based upon. The fact is, we generally look the plant over, see the cooperage is all filled. We haven't any course of—basis of measuring the amount of wine in this particular case, but we are reasonably assured that the facts as he has given them are reasonably correct, and we are willing to assume the responsibility on that basis.

Q. All right. Entirely apart from the existence of the inventory, what check do you make with respect to the valuation?

A. We set our own valuation.

Q. In other words, if the loan applicant— Strike that, please. You set your own valuations. Do you examine into market conditions at that time?

A. Surely.

Q. In that particular industry?

A. That is correct.

Q. In this case do you recall whether or not you had differences with Mr. Particelli as to the valuations of the inventories?

A. No. You see, in the first place, to make myself clear, [30] we did not take a chattel mortgage on the wine as such. We took a blanket chattel mortgage and deed of trust on that $70,000. As far as

(Deposition of H. L. Hotle.)

we were concerned we had one note, although, of course, we—legally we had two, and it was secured, in other words by an over-all——

Q. I'd prefer you wouldn't go into those notes because I haven't laid a foundation for asking you about them at the present time.

A. What I was trying to make clear, you brought up the matter of inventory. As far as the bank was concerned when we made that loan we made it on the over-all picture, the whole thing. If wine was weak in one case or strong in another we made it up the other way. That is why the blanket loan. Therefore, our security was the total assets. If we had been long specifically on wine, of course, we'd have been probably more careful with our check.

Q. Now, recalling again, you don't recall ever having had any differences with Mr. Particelli as to the valuation to be placed upon his wine inventory? A. No.

Q. I want to call your attention particularly to the statement, net worth statement of Mr. Particelli dated July 7, 1943, which is one of the statements contained in Respondent's Exhibit O for Identification, and call your attention to this item of $84,000 appearing as the value of 105,000 gallons of wine. Do you recall any discussion about that particularly?

A. No, I don't recall any particularly.

Q. Now, then, I notice there is an item for $12,000 on the second line—for $12,000, entitled "2 cars wine rolling". What do you understand that to mean? [31]

(Deposition of H. L. Hotle.)

A. Wine rolling in the cars to eastern market, I am assuming.

Q. Under a bill of sale and bill of lading?

A. I imagine so, yes.

Q. And the information, I presume in the ordinary course of business the bank would ascertain that, what the selling price of that wine was, wouldn't it?

A. No, not necessarily. We'd probably ask him what he thought it was worth. In other words, that was strictly a financial statement. When a man shows a very great excess of assets, in other words, we are not too particular as to tie him down to specific things because we know on the overall picture that our loans are perfectly securable.

Q. In other words, you are not going into too much detail as to the valuation he places upon his net worth and his assets. A. That is right.

Mr. Marcussen: I would like to offer as Respondent's exhibit next in order Respondent's Exhibit O. No, I beg your pardon. Not Respondent's, but Exhibit—Respondent's Exhibit O for Identification.

Mr. Brookes: No objections. Excuse me, off the record.

(Off the record.)

Q. (By Mr. Marcussen): Mr. Hotle, you have handed me two other yellow sheets on entirely different form and somewhat smaller than the yellow sheets composing an exhibit which Respondents

(Deposition of H. L. Hotle.)

have already introduced in evidence. I'd like to have you tell me what they are.

A. Those are extensions of credit we made to Mr. Particelli [32] in the Sebastopol National Securities Company, which is a holding company owned by the Bank of Sonoma County, a separate corporation. We use that corporation for excess loans of credit which we could not make in the bank.

Q. Due to statutory limitations?

A. That is correct. That is our competitive ace in the hole.

Q. Your building and loan association.

A. That is right.

Mr. Marcussen: Off the record.

(Off the record.)

Mr. Marcussen: Back on the record, then. I would like to offer these two sheets as Respondent's exhibit next in order, which, if my memory serves me correctly, would be BB.

Mr. Brookes: No objection.

Q. (By Mr. Marcussen): I'll ask you to state, then, describe these entries on the first of these two sheets; the first entry, October 4, 1943. I don't mean to have you identify them all, the total credits of $16,500.

A. That represents unsecured loans made apart by the securities company.

Q. There are three different amounts appearing in the column "Charges."

(Deposition of H. L. Hotle.)

A. Those are the charges, and the balance shows the continuing balance.

Q. Under the date indicated?

A. That is correct.

Q. Can you tell me what this second sheet it?

A. The second sheet represents a collateral and real estate loan, $22,500, which was made at the time these other loans [33] were paid off through the payment—through the isuance of the new loan.

Q. Do I understand it correctly that the unsecured loand of $16,500 was included in a secured loan of $22,500? A. That is correct.

Q. And that transaction occurred November 16, 1943? A. That is right.

Q. Now, I call you attention to a debit item of $47,500 appearing under the symbol "r-e", which I understand is a secured real estate loan, and ask you to state whether my understanding is correct.

A. That is right. That was also secured by a chattel mortgage which isn't indicated there. In other words, we normally put it under real estate even though—In other words, the collateral loan is really side collateral in a sense.

Q. Yes. Then I note that transaction occurred on October 20, 1943. Then I will ask you to state if you can, please, what was the total amount of the loans to Mr. Particelli on or about December 1, 1943?

A. Well, the record would indicate a total—Loans, you mean, of all institutions?

Q. Yes, of all institutions.

A. The record would indicate $70,000.

(Deposition of H. L. Hotle.)

Q. Yes. You testified these institutions for all practical purposes operated together?

A. That is correct.

Q. And this total of $70,000 was a secured loan?

A. That is right.

Q. That is composed of this figure $47,500 appearing on the last yellow sheet of Respondent's Exhibit AA, page A thereof, [34] and the item of $22,000—$22,500 appearing on the second of these two smaller yellow sheets, Respondent's Exhibit BB?

A. That is right.

Q. And again, that entire amount was secured not only by real estate but by all of—a pledge of all of the assets of Mr. Particelli as you were aware of them, is that right?

A. That is right.

Q. Calling your attention to Exhibit E-5 attached to the stipulation, Mr. Hotle, and to the last paragraph contained——

A. That isn't the right one, understand that. That is December 21st.

Q. Yes, I understand it. I think we have enough information in the record. We are leaving this in the record for our purposes. I call your attention that it reads: (Reading) "You are authorized to place on the above deed revenue stamps in the sum of $110." Do you know what valuation that indicates on the real property transferred by stamps in that amount as of that date?

A. Well, a dollar and ten cents a thousand. A hundred thousand dollars, I guess.

(Deposition of H. L. Hotle.)

Mr. Marcussen: That is all.

* * * * * [35]

[Endorsed]: Filed June 23, 1950.

The Tax Court of the United States

Docket Nos. 25439-25440

DEPOSITION OF JOHN DUMBRA AND VICTOR J. DUMBRA

called on behalf of the Commissioner of Internal Revenue, taken pursuant to notice, held at the offices of Buchman & Buchman, Esqs., 292 Madison Avenue, New York, N. Y., on Wednesday, June 14, 1950, at 1:45 o'clock p.m. before Maxwell S. Lipton, a Notary Public duly authorized to administer oaths in the State and County of New York.

Appearances: Valentine Brookes, Esq., Attorney for petitioner, Mills Tower, Room 1720, San Francisco 4, California. Leonard Allen Marcussen, Esq., Attorney for Respondent, Bureau of Internal Revenue, 55 New Montgomery Street, San Francisco, California.

Proceedings

Whereupon

JOHN DUMBRA

was called as a witness on behalf of the Respondent and having been first duly sworn by the Notary Public, testified as follows:

(Deposition of John Dumbra.)

Direct Examination

Q. (By Mr. Marcussen): Will you state your full name for the record?

A. John Dumbra.

Q. Your address?

A. 108-18 66th Road, Forest Hills, Long Island.

Q. What is your occupation, Mr. Dumbra?

A. In the wine business.

Q. Who is your employer? A. Myself.

Q. You are employed by yourself?

A. Yes.

Q. At the present time?

A. At the present time, yes.

Q. What was your occupation in 1943?

A. Finder for wines; finding sources of supplies in wines.

Q. That is what you mean by a finder, is that correct? A. That's correct.

Q. In the course of your employment for Tiara Products [3] Company in 1943 did you have occasion to look for sources of wine in California?

A. Yes.

Mr. Brookes: Mr. Marcussen, this is your witness. I suggest that you avoid such leading questions, so that we won't have the record filled with objections. That was a leading question.

Mr. Marcussen: Yes, it was.

Mr. Brookes: And you haven't even established the employment of him by Tiara.

Mr. Marcussen: I thought I had.

(Deposition of John Dumbra.)

Q. (By Mr. Marcussen): Did you testify that you were employed by Tiara Products Company in 1943? A. Yes, I was.

Q. What was your capacity, again, with them?

A. Finder for sources of supply of wines.

Q. Did you in 1943 go to California in connection with your duties as a finder of wines?

A. Yes.

Q. Do you know Mr. Giulio Particelli, the taxpayer in this case? A. Yes.

Q. Did you have any conversations in the latter part of 1943 with him concerning purchase of wine from him for Tiara [4] Products Company?

A. Yes.

Q. I show you copy of Exhibit A-1, which was introduced in evidence in this proceeding, and call your attention to the fact that that is an agreement of sale between John Dumbra and G. Particelli, and ask you whether you are the John Dumbra referred to in that exhibit (handing to witness)?

A. Yes.

Q. I call your attention to the fact that it is dated December 6, 1943. With that in mind can you place as accurately as possible the date of your first conversation with Mr. Particelli?

A. The date of the conversation, the first conversation with Mr. Particelli, was a day or two before.

Q. A day or two before that?

A. Before that.

Q. In seeking out Mr. Particelli, what did you do?

(Deposition of John Dumbra.)

A. Well, I went to the store in Forestville and I saw his daughter and his son-in-law. He wasn't there at the time. Then about a day later or so I called up towards the late evening and spoke to Mr. Particelli and he came down—I was in Santa Rosa and he came down to Santa Rosa.

Q. In that conversation when you called him, what was said by you and what was said by Mr. Particelli as best you can recollect it? [5]

A. I told him that I was interested in getting some wines, and if he could talk with me about the wines.

Q. What did he say?

A. He said yes. I said to him that I would like to taste the wines.

Q. I am talking now only about the conversation on the telephone.

A. About wines; he said he would be down right after that.

Q. But you did tell him in that conversation on the telephone, did you, that you were interested in acquiring some wine? A. Yes.

Q. And he said that he would make arrangements to see you? A. Yes.

Q. What arrangements did you make then?

A. Then he came down to Santa Rosa and we discussed the wines.

Q. That same evening.

A. The same evening. I told him I would like to taste the wines, and he suggested that we go over to the winery to taste them, which we did.

(Deposition of John Dumbra.)

Q. In that conversation did you tell him what quantity of wine you were interested in acquiring?

A. Not at that particular point. We just talked wines, and I wanted to taste the wines, primarily to see if they were all right.

Q. Did you eventually taste the wines?

A. Yes. I tasted the wines at the winery.

Q. When? A. The next day.

Q. Yes?

A. And the wines were sound; good wines. I asked him if he would give us four cars of wine.

Q. What did he say?

A. He said he couldn't do that because he couldn't make a profit on it. He said he would consider selling all of the wine and the winery all together, because he wanted to get out of business.

Q. What did you say at that point?

A. I asked him how much he wanted.

Q. Excuse me just a minute. I want to know whether you said anything to him with respect to the quantity of wine you would be interested in then. Did you ask him whether you could get any lesser amount?

A. Yes. Well, I tried to get three cars from him, but he wouldn't sell—he told me the same thing, that he couldn't make any profit on it.

Q. Yes? [7]

A. And he said the only way he would sell would be to sell all the wine and the plant.

Q. Incidentally, could you explain why you

(Deposition of John Dumbra.)

asked for four cars at first and then only asked for three cars?

A. I thought if I asked for a smaller amount I might get some wine, and then later on I might get some more wine.

Q. Then you were about to tell us about your discussion about the price for the wine. What conversation was had with respect to that?

A. I asked Mr. Particelli what price would he want for everything, and he told me that he wanted $350,000. I told him would he considered three-thirty and I would check to see if it would be all right at those figures. He said no, that he only had one price and that was three-fifty.

Q. This is the same day out at the winery when all this occurred?

A. Yes, when we tasted the wine it was all the same day.

Q. What final arrangement did you make with Mr. Particelli then, that day?

A. Then I checked with——

Q. No, what did you tell him that you would do at that time; what did you say to him?

A. That I would advise him whether we would be interested after we checked on it.

Q. What do you mean "after we checked on it"?

A. I checked with my brother on price.

Q. What is your brother's name?

A. Victor.

Q. Are you an expert taster of wines?

(Deposition of John Dumbra.)

A. I am a good taster of wines; I wouldn't say an expert.

Q. Are you competent to judge the quality of wine by tasting it? A. I believe so.

Q. As between poor, good, very good, how would you, on the basis of your taste alone, what conclusion did you come to with respect to the quality of Mr. Particelli's wine?

A. They were very good sound wines.

Q. Did you make any inquiry concerning his reputation, or did you know what his reputation was for producing wines?

A. Yes. We knew through the trade that he produced good wines.

Q. Did you finally call your brother Victor?

A. Yes.

Q. Where was he?

A. In New York here.

Q. To digress a minute, I want to ask you about the winery—what kind of a winery was that; what was its condition?

A. It was a small winery. It didn't have too much equipment. It was more of a, I would say, a storage winery. [9]

Q. Was there any distilling equipment?

A. No, no distilling equipment.

Q. What was the extent of the equipment as you can best recollect it?

A. Well, I would say that the crusher, press, filter, tanks, hoses——

Q. By tanks and hoses, you mean cooperage?

(Deposition of John Dumbra.)

A. Yes. All were in sound shape.

Q. I think you testified that you did call Victor. What did you say to Victor and what did he say to you?

A. I told him the price that Mr. Particelli wanted was $350,000, and I had tried to get it for $330,000, but he was stuck on that price. And Victor then said, "If it is necessary, pay the $350,000. But if you can get it a little lower, try."

Q. Did he first make any inquiry as to the quality of the wines?

A. Yes, and I told him that they were satisfactory quality.

Q. Did you describe the plant in general terms to him? A. Yes, in general terms.

Q. After your talk with Victor, what did you do?

A. Then I spoke to Mr. Particelli and I told him that we would go along with him on that. He told me to get him at his lawyer's office in San Francisco. [10]

Q. What was that, the following day or the same day, do you recall?

A. I think the same day or so. It might have been the following day.

Q. By the way, you said that all of this took place one or two days before December 6th?

A. Yes.

Q. In view of the statement that you have just made, it couldn't possibly have been one day, could it?

A. No, it was all on the 6th.

(Deposition of John Dumbra.)

Q. Yes. But I mean your first negotiations and attempts to see Mr. Particelli must have occurred two or three days prior to it, then, didn't it?

A. Well, it had. Because I had been to the plant previously and he wasn't there.

Q. Did you then meet Mr. Particelli and his attorney in San Francisco? A. Yes.

Q. What did you do there and what was said by you and the other parties as you can best recollect it?

A. There wasn't much said except that Mr. Particelli said that he was going to draw up the whole thing together, and the price would be $350,000.

Q. By the way, at that conference that you had at the winery when he first mentioned the $350,000, did he have anything [11] else to say as to how he wanted that set up in the event that you entered into a contract?

A. When he said that he couldn't make a profit, I said, "I don't care how you do it, as long as the total price will not exceed the $350,000, and the gallonage is correct."

Q. I take it that his was the explanation that he gave as to why he wanted to sell the whole thing, but did he say anything as to how he wanted the final contract arrangements drawn up?

A. Well, he did say that he would make the wine one figure and the plant another figure, but it would be a total price. I didn't care about that.

Q. Did he ask you specifically whether it would

(Deposition of John Dumbra.)

be all right to draft it in a manner satisfactory to him?

A. Yes. I said I didn't care as long as the price didn't exceed $350,000, and if the gallonage was all right.

Q. Did you inform Victor of that in your conversation with Victor on the telephone?

A. Yes.

Q. Did you at any time make a separate agreement for the purchase of the wine at $77,000, and thereafter ask Mr. Particelli if he would be interested in selling his winery also? A. No.

Q. Did you ever enter into a separate agreement for the purchase of the winery for $273,000? [12]

Mr. Brookes: I object to the question, Mr. Marcussen. You are asking him to testify to whether or not the papers that were signed in this agreement—that are stipulated in this case as exhibits as having been signed and agreed to, were signed and agreed to. You are asking him for testimony which is inconsistent with the stipulated papers.

Mr. Marcussen: I thought I had laid a foundation for that by my first question, and I am now merely following through on that first question. However, perhaps I can rephrase that.

Mr. Brookes: I suggest you withdraw the question, and that the answer be stricken, and that you rephrase it, Mr. Marcussen. I think if the reporter would read your question back you would find that you have departed from the form of the question which you put to Mr. Dumbra about the $77,000.

(Deposition of John Dumbra.)

Mr. Marcussen: Mr. Reporter, would you read the first question about $77,000 separate transaction, and then read the second question to which objection was taken.

(The reporter read the question as follows: "Q. Did you at any time make a separate agreement for the purchase of the wine at $77,000, and thereafter ask Mr. Particelli if he would be interested in selling his winery also?")

Mr. Brookes: May I interrupt to explain, Mr. Marcussen, [13] that to me the key was the word "thereafter," and to me the question is objectionable because of the absence of the word "thereafter."

Mr. Marcussen: I understand, I can see that. I will rephrase this question in the same manner.

Q. (By Mr. Marcussen): Did you at any time enter into a separate agreement to purchase Mr. Particelli's inventory of wine at $77,000, and thereafter enter into a separate agreement to purchase the winery for $273,000? A. No.

Mr. Marcussen: That's all.

Cross Examination

Q. (By Mr. Brookes): Mr. Dumbra, did you have any difficulty in understanding Mr. Particelli in your oral discussions with him?

A. Yes, it was quite difficult to understand him.

Q. Did you find that at times you were not certain of what he was saying? A. Yes.

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Q. Did you leave your conversations with him with the impression that some of the statements that he had made to you you had not understood clearly?

A. Well, it was quite difficult to understand him at times. [14]

Q. That is not responsive to my question, Mr. Dumbra. I ask you whether you felt, in the course of your conversation with him, that at times you were not understanding him correctly?

A. Yes.

Q. Did you understand Mr. Particelli to say anything to you about the ceiling price on his wine?

A. No.

Q. You referred in your direct examination to a statement made by Mr. Particelli that he couldn't sell his wine at a profit. A. Yes.

Q. What did you understand that he meant?

A. That the wine cost him more and he couldn't sell it to me at any price, and then he did say that he wanted to go out of business, and he wanted to sell the whole place, of course that——

Q. Why couldn't he sell it to you at a profit?

A. I didn't ask him that. What I did ask him is that I would pay him whatever price he wanted, and he said he couldn't sell it to me at a profit.

Q. What did you understand that he meant as his reason for not being able to sell it to you at a profit?

A. I imagine he meant the ceiling prevailing at the time. [15]

Q. Did you know what the ceilings were?

(Deposition of John Dumbra.)

A. I didn't ask him, because if he sold it to me at the ceiling, I would buy it.

Q. Did you understand that Mr. Particelli had the ceiling price in mind when he was telling you the price at which he was limited at selling his wine? A. I think so.

Q. In your description of the events leading up to the agreement dated December 6th between yourself and Mr. Particelli, you said that you wanted to check the wine? A. Yes.

Q. And I believe you testified that you went to the winery with Mr. Particelli?

A. Yes.

Q. And you testified that you tasted it?

A. Yes.

Q. Did you do anything else that day to check the wine?

A. I tasted all the wine, spot checked through the plant with him, tasted the wine and found it to be good.

Q. Were you interested in how much wine was there? A. Definitely.

Q. Did you check that?

A. Well, it wasn't necessary to check it because he had a government controlled form on the gallonage, and that would have to coincide with their reports. [16]

Q. Did you check the reports and the government form before December 6th?

A. I didn't check the government report. I took his word for that because I don't think he would

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tell me anything against that.

Q. You felt that you could rely on his word as to the quantity of wine that he had? A. Yes.

Q. Why was that, Mr. Dumbra; had you checked his reputation?

A. He seemed to have a good reputation in the trade.

Mr. Brookes: No further questions.

Redirect Examination

Q. (By Mr. Marcussen): When you said he seemed to have a good reputation in the trade, are you referring to his capacity as a wine maker or to his reputation for truth and veracity?

A. For his wine making and a few people that had talked, the few people who had talked of him said that he was, you could depend on his word.

Q. But with respect to this particular inquiry about the gallonage you, as I understand your testimony, were willing to take his word for the gallonage because there were official reports which you could check?

A. Because there were official reports, definitely.

Q. Do you recall whether or not you checked the official reports, or was the agreement made contingent upon submitting copies of those reports?

A. Naturally, it was contingent on the submitting of the reports later.

Q. So that you were taking his word?

A. At the time?

Q. At the time. A. Yes.

(Deposition of John Dumbra.)

Q. Except with that reservation in mind that it would be subject to check by official reports, is that correct? A. Yes.

Q. When you stated that you would be willing to buy at Mr. Particelli's ceiling, what did you understand his ceiling to be?

A. I didn't say that I will buy at his ceiling. I said that I would buy at whatever price he would sell the wine for.

Q. Yes. But I think you also testified that you would be glad to buy it at his ceiling?

A. I would be glad to buy at his ceiling.

Q. What did you understand the ceiling to be?

A. We didn't get to his ceiling price because of the fact that he didn't want to sell the wine.

Q. I see. But you did understand him to say that he was unwilling to sell his wine alone because he couldn't make [18] a profit on the sale of the wine?

A. Yes.

Mr. Brookes: I object to the question, Mr. Marcussen. This is your witness, and that is obviously a leading question. The witness has testified, and I think that his testimony is what the Judge will be interested in and not Mr. Marcussen's testimony.

Mr. Marcussen: That is undoubtedly true. I think, however, that the question is proper in view of the cross examination, so I will let it stand.

Mr. Brookes: That is entirely without the scope of the cross examination, Mr. Marcussen. It is a restatement in your own words of what you conceive to be certain things that the witness testified

(Deposition of John Dumbra.)

to on direct examination, and I will press my objection in my briefs unless you wish to withdraw it.

Mr. Marcussen: No, I won't withdraw the question. We will have to leave it, I think, for a ruling by the Court.

Q. (By Mr. Marcussen): I think you testified on cross examination that you had some difficulty at times in understanding Mr. Particelli?

A. Yes.

Q. When you had those difficulties did you make any attempt to see to it that you did correctly understand him? [19] A. Yes.

Q. As you went along in your conversations?

A. Yes.

Q. Did you make any further statement to Mr. Particelli in respect to his wines, about an analysis?

A. Yes, I said we would have to take an analysis of all the wines later on.

Q. Did you make arrangements for that analysis? A. Yes.

Mr. Marcussen: That's all.

Recross Examination

Q. (By Mr. Brookes): Mr. Dumbra, I hand you Exhibit No. 1-A, which the parties stipulated as an accurate copy of an agreement signed by yourself as buyer and Mr. Particelli the seller, and the date of that document is December 6, 1943 (handing to witness). At the time that you signed that agreement of sale, the original of the exhibit A-1, had you examined the government reports for any other con-

(Deposition of John Dumbra.)

firmatory data showing the gallonage of wines that was stored at the Lucca Winery?

A. I believe at the time that was signed we looked at the actual gallonage report.

Q. This was where?

A. At the attorney's office.

Q. In what city? [20]

A. In San Francisco.

Q. Had you had any check other than the government reports made of the wine content of the winery?

A. Well, as I had gone through the winery, I marked down the size tanks on a piece of paper, and took a rough gallonage to see how much was there. And as you go around the tanks, naturally, being in the wine business you tap a tank to see if it is full, spot check.

Q. Was your signing this agreement dependent upon your seeing the government reports?

Mr. Marcussen: If you remember.

Q. If you remember, yes.

A. I don't remember that.

Q. Did you understand that you were free not to sign this agreement of sale if the government reports showed a smaller gallonage of wine?

A. I would have signed that, the agreement.

Q. Any way?

A. Yes, because I had assumed that there might be residue in the tanks——

Mr. Marcussen: Just a moment, I object to that question on the ground that it is purely hypotheti-

(Deposition of John Dumbra.)

cal and not based upon anything in the case. He has testified that he did see those reports at the attorney's office and checked the gallonage before signing the agreement. [21] I don't think it is material to inquire as to what he might have done if he had not seen these reports; and in effect that is your question.

Mr. Brookes: That was my question, counsel, and I think it is material because, as I understand his testimony, he has suggested that he and Mr. Particelli made a certain oral agreement in reliance upon Mr. Particelli's statement prior to the signing of this agreement.

He has further testified on recross examination that he did see the government reports, as he remembers it, prior to signing this agreement. I am trying to find out if Mr. Dumbra felt that he was obligated to sign this agreement even if the government report showed a different quantity of wine present than the amount that was represented to him.

Mr. Marcussen: Then I will object to it on the further ground that it calls for his conclusion, a conclusion of law which this witness is not competent to make.

Mr. Brookes: This witness is certainly competent to make a conclusion as to what he was free and not free to do.

Mr. Marcussen: I must let the objection stand.

The Witness: I would like to rephrase that, then.

Q. (By Mr. Brookes): [22] Please answer.

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A. Answer your question?

Q. Rephrase it as you wish.

A. Yes——

Mr. Marcussen: It being understood that respondent's objection goes to this entire line of questioning.

A. That of course I know that the gallonage necessarily must be exactly as it is reported in the government forms. The thing that I was going to say was this:

That if it was a case of a little shortage of lees or residue, only from the actual count of the total amount, then it wouldn't be too much of a problem. But if it were too far away, it would be another matter.

Q. And my question, Mr. Dumbra, then, is: If it was, as you put it, too far away from the gallonage that Mr. Particelli had represented to you, would you have signed this agreement?

Mr. Marcussen: I object to that on the same ground.

Mr. Brookes: Your objection has been made, and it relates to this question.

Mr. Marcussen: That it has nothing to do with this case, that the procedure was not followed, and it is entirely immaterial to inquire as to what he would have felt free to do if the facts had been otherwise than they have actually been developed here. And further on the ground that the witness has testified that he had spot checked [23] those tanks and ascertained that the gallonage represented

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on the tanks was there. That's the basis of the government's objection.

Q. (By Mr. Brookes): Now will you answer the question, Mr. Dumbra?

Mr. Marcussen: If you don't recall the question, would you like to have it re-read?

The Witness: Yes, I would.

(The previous question was repeated by the reporter.)

A. No.

Mr. Brookes: That's all.

Redirect Examination

Q. (By Mr. Marcussen): Do I understand you, by your testimony just concluded on recross examination, to say that you would not have signed an agreement for the purchase of 276,000 gallons of wine, and the payment for such gallonage if that gallonage wasn't there; is that what you meant when you answered the question, yes you would have been free; or is that what you meant by your testimony?

A. If it was too far away I wouldn't have signed it.

Q. In any event would you have contracted to buy any more wine than you knew he could deliver?

A. I don't quite follow that.

Q. In any event, would you have promised to pay him on [24] behalf of Tiara or yourself or however this transaction was handled, for 276,000, or 275,000 gallons of wine, say, if there were only 250,000 gallons there, and you knew that to be a

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fact? A. I wouldn't pay for that.

Mr. Marcussen: That's all.

Mr. Brookes: I have no further questions, and we have concluded with Mr. John Dumbra.

(Witness excused.)

Whereupon

VICTOR J. DUMBRA

was called as a witness on behalf of the Respondent, and having been first duly sworn by the Notary Public, testified as follows:

Direct Examination

Q. (By Mr. Marcussen): Will you state your full name, please? A. Victor J. Dumbra.

Q. What is your residence address, please?

A. 110-11 68th Avenue, Forest Hills, Long Island, New York.

Q. What is your business, Mr. Dumbra?

A. I am employed by the San Benito Company, in the wine business.

Q. In 1943 what was your business? [25]

A. I was an employee of Tiara Products Company in the wine business.

Q. What was your capacity?

A. President and manager.

Q. What was the business of Tiara Products Company in 1943?

A. General wine merchants, processors, blenders, producers, bottlers.

Q. Will you describe the operation in a little bit

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more detail at that time?

A. What do you want?

Q. You said you produced some wine. Where did you produce wine?

A. Right here in Manhattan. We would bring in concentrates from the West Coast, produce base materials. We would bring in raw wines, also called unfinished wines. We would bring in tanks of wine and then blend them to our standards.

Q. Were you referring to crushing wine in the first place and crushing the juice?

A. Both, we did some crushing, but not much to talk of in New York City.

Q. To whom did the company sell wine?

A. Mainly to the wholesale trade all over the country.

Q. In what form did you sell it? [26]

A. Bottle goods, primarily, and bulk.

Q. You said something, I think, about blending wine? A. Yes.

Q. Will you describe that process?

A. Yes. We would take in wines of different areas that we considered the proper type for a blending—let's assume for a dry white wine, we would take in a northern wine, probably a New York State wine, and, on another type, we would blend them together to our standards.

When I say "our standards," I mean alcoholic content, color, acidity, and liptical taste, or taste by mouth.

Q. You heard the testimony of your brother

(Deposition of Victor J. Dumbra.)

here, did you, that he was employed as a finder in 1943 by Tiara Products Company?

A. Yes, I did.

Q. Did you give him his assignment to the Pacific Coast to find wine?

A. Yes, sir, I did.

Q. What were your instructions to him in sending him out there?

A. The instructions to him were to go out and find wine. If there were a few cars to buy, he knew the price levels that we would pay. If there were other deals, find out what the deals were, call me and we would then proceed.

Q. Was the company interested at that time in acquiring [27] wineries?

A. Not particularly. We needed wine to continue our operations.

Q. When you say "particularly," did you in 1943 acquire wineries? A. Yes.

Q. Will you describe how it was that the company came to acquire those wineries?

A. Well, it is a known fact that big blocks of wine were sold either as a stock sale or total sale of company. That was one of the means and methods of getting wine. We did get some wines without having to buy wineries.

Q. Did you ever go out and buy a winery without wine? A. Oh, no.

Q. In 1943? A. Oh, no.

Q. In 1943 did you try to buy a winery without wine? A. No, sir.

(Deposition of Victor J. Dumbra.)

Q. Well then, how was it that you came to buy any winery in 1943?

A. Well, in seeking wines we were offered the wineries with them and then you imagine an evaluation and say, well the plant goes with the wines, and we come out, and that's it.

Q. In other words, is it fair to say that your testimony is the purchase of the wineries were in connection with [28] the purchase of wine alone, is that correct?

A. Well, if you will say that we bought the wineries with the wines, and then had to figure it in our price, I would say yes.

Q. Do you recall having a conversation with your brother John on the telephone about Lucca Winery?

A. Yes.

Q. Will you state your recollection of that conversation?

A. Well, the best of my remembrance or knowledge——

Q. The substance.

A. The substance is this: That here is a winery in the northern part of California, the good red wine producing area with a block of wine in it at a figure. I did some quick figuring and said, "All right, try and get it as low as you possibly can. But if you must make a deal at that price, go ahead, we can handle it."

Q. What price?

A. $350,000 was the price he told me they asked at that time.

(Deposition of Victor J. Dumbra.)

Q. In authorizing him to purchase at $350,000 if he had to, what were the factors that entered into your mind in giving that authorization, particularly with respect to the value you placed upon the wine and the winery at the time?

A. I had to know the quantity of wine.

Q. And what else about the wine? [29]

A. We do know this in this industry——

Q. You say quantity? A. Quantity.

Q. Yes; what else about the wine did you have to know before you would authorize the purchase?

A. Naturally he was told always to check wines. If the wine was sound, then proceed. Check by taste and then have a laboratory analysis made.

Q. I had you a document entitled "Analysis of Wine Samples," and it bears the inscription above that "Lucca Winery, Forestville, California," and ask you to state the values, please (handing to witness).

A. This apparently is a copy of an original analysis made by Berkeley Yeast Laboratories who are independent consultants to the wine trade in California.

Q. Where is the original of that document, do you know?

A. No. I am afraid I can't answer that at the moment. But this looks like a copy of the original without the signature.

Q. Do you know whether or not that was produced in response to a subpoena duces tecum?

(Deposition of Victor J. Dumbra.)

A. Yes, we were asked and these came from our files.

Q. What file was that in, in your office?

A. In the Lucca Winery file, or more exactly, Particelli file. [30]

Mr. Marcussen: I would like to offer that as Respondent's next exhibit in order.

(Discussion off the record.)

Mr. Marcussen: I will offer this as Respondent's Exhibit DD, since I don't know what the next exhibit in order is.

Mr. Brookes: No objection either to the offer or to the designation.

(Whereupon the document referred to was marked Respondent's Exhibit DD in evidence.)

Q. (By Mr. Marcussen): I call your attention to the bottom of the first page of that report under the heading "General Description." It states there: "Dry red wine, heavy in body." Will you describe what is meant by wine heavy in body?

A. Well, wine heavy in body is a fruity, dark colored wine, high in natural tannins and acidity.

Q. Is it a favorable characteristic to have wine heavy in body?

A. Well, a wine heavy in body is good for blending down with lighter types of wines. I don't mean lighter in alcohol, I mean lighter blend or a lighter produced wine, lighter tasting wine. This wine is sold as is without touching it to the Latin trade that like a heavy tasting wine, a full-bodied wine.

(Deposition of Victor J. Dumbra.)

Q. I call your attention to the other descriptions at [31] the bottom of the page here of page 1, and continued on page 2, and ask you to state whether the description there, or what the description there is; how would you rate the wine based upon that description, on its quality?

A. On this analysis?

Q. Yes.

A. I would say that this reflects a good sound wine.

Q. What do you mean by "sound?"

A. Well, I think if you read this, it would tell you more than I could. It is expressive. I would have to use the same words as are on here.

Q. By looking at that again, would you read that as merely good, or would you give it any additional or any lesser rating than good in view of what is stated on that report?

A. I would almost be tempted to say, to use the same words; it is a medium heavy smooth flowery wine.

Q. In spite of all that language, you would just characterize it as good wine?

A. Good wine; that means good wine in any language. Your analysis here distinctly says "moderately full, dry but not acetic."

Q. Being not acetic is——

A. Meaning that there is no volatile acetic acid in there which is connected with vinegar. That we could see from the analysis here. [32]

Q. What does the word "rounding" mean?

(Deposition of Victor J. Dumbra.)

A. The wine doesn't have any rough or sharp edges. It is a smooth, palatable wine.

Q. To the taste?

A. To the taste, correct.

Q. Do you know anything generally about the quality of wines that are produced in the Sonoma Valley where the Lucca Winery is, as I understand it?

A. It is considered a very good area, section for red wines.

Q. Why, do you know?

A. Well, it is a northern country, and dry wine grapes are better grown in those northern, cold climates where the grape has to fight and dig for sustenance rather than get it directly from the sunlight. Most of the vines are on mountains where the soil is rocky. I could go into a long thesis if you want me to go on.

Q. Do you know generally how the quality of the wines produced there—and I am speaking now of standard wines—compares with the quality of wine produced in the Napa Valley?

A. Oh, they are both very good counties, very excellent places for wine. Both very excellent.

Let me clarify that answer with references to table wines. I said wines in general; I should qualify that.

Q. You mean dry wines? [33]

A. Table wines. No, you could have a dry wine and still not be a table wine. A good table wine area.

(Deposition of Victor J. Dumbra.)

Q. Did you testify—I think I asked a question a moment ago—as to what considerations you made and what relative values you placed upon the wine and the winery in a total figure of $350,000 which you authorized your brother to purchase this wine at, if necessary?

A. Well, quite frankly we didn't place an exact value on the plant. We took more into consideration how much wine was in the plant, and then said, well, mental calculation, it might be worth fifty, sixty thousand dollars for the plant. We wouldn't know the exact value, as far as I was concerned.

Q. Is that the figure that you hoped to get out of the plant?

A. You always hope to get the best figure you possibly can.

Q. When that winery was purchased, did you have any intention at the time of purchase of operating the plant as a winery?

A. We knew that Mr. Particelli had produced wines there; we also knew from the description that my brother gave me of the plant, that it was not a modern, up to date plant. And if you ask me did we intend to operate it, that would be a question that I could only answer six or eight months later when the next season came around. If he saw fit to operate [34] it, logically, we would operate it.

Q. When did the next season begin?

A. That begins in September.

Q. Had you made efforts prior to September to sell that winery?

(Deposition of Victor J. Dumbra.)

A. Yes, some time after May or in June we put it on the market through the Wine Institute Bulletin, and through our attorney, Mr. Mull.

Q. I call your attention to Respondent's Exhibit N in this proceeding, which purports to be a carbon copy of a letter to Tiara Products Company from Mr. Mull, calling your attention to the last paragraph on the first page (handing to witness). I ask you to state whether the figure of $60,000 there, or thereabouts, is the figure that you attempted to sell the winery at?

A. Well, he states exactly what we conveyed to him, that we would sell for $60,000 less 5 per cent. Frankly, we had offers for $40,000 and $45,000, and we let it go.

Q. Would you have taken any less than $60,000?

A. We would have taken fifty, fifty-five. We set an asking price on a plant and then you work a deal on it.

Q. Did you finally sell the winery?

A. Yes, we finally sold it.

Q. When was that?

A. The market broke—oh, the latter part of '44, I [35] believe.

Q. What did you get for it? A. $20,000.

Q. How did you account for the difference in the price you actually got and the price you had previously attempted to sell it at?

A. Poor market for table wine wineries, that's all. Table wine plants, whichever way you want to put it.

(Deposition of Victor J. Dumbra.)

(Discussion off the record.)

Q. When you testified a moment ago that the market broke, what were you referring to, wineries, the market for wineries?

A. Oh, yes, definitely.

Q. Producing dry wines?

A. Well, I later clarified that, if I remember correctly, sweet wine was still at a premium because of the demand for the sweet wines, which is far and above table wines in this country.

Q. What was the ceiling of Tiara Products Company for the sale of wine by the case?

A. To the best of my recollection now, it was beyond $7 a case of fifths, because we established a good price on wines and took advantage of that ceiling.

Q. Do you know whether you had a high or a low ceiling for that wine?

A. That was considerably high. [36]

Q. How much could the company net on that wine after deducting all of its costs except the cost of the wine itself that it purchased or produced?

A. Deducting taxes and glass and everything from the wine?

Q. Yes.

A. Oh, I judge we would average out about $2 a gallon.

Q. Then deducting from the $2 a gallon the per gallon cost of the wine itself, that would give you your net profit, so to speak, per gallon?

A. If you put it directly to that wine. But we

(Deposition of Victor J. Dumbra.)

had a bigger operation than that.

Q. I am not tying this to any particular wine, I am just asking you the question in general to clarify the whole situation there. A. Yes.

Q. From the $2 net per gallon that you described, is the figure which you arrive at after deducting all costs except the cost of the wine itself, is that correct?

A. Yes, $2—10 per cent one way or another.

Q. Yes, approximately?

A. Approximately it is $2, yes.

Q. I think you testified, but I am not certain, that the company also sold wine in bulk?

A. Yes. [37]

Q. What was its ceiling for bulk?

A. Which type do you mean?

Q. Dry wines.

A. There were whites and reds. I think we had established a ceiling of about $1.40 on white, and I believe from $1.10 to $1.25 on reds.

Q. Again I would like to ask you to refer to this transaction which you authorized your brother to enter into for $350,000 covering both wine and winery, and ask you whether you can state approximately the figure that you considered that you were paying for the wine itself in authorizing that total sum?

A. I will have to ask you how much gallonage was in the winery at the moment; was it 277,000?

Q. 275,000. A. Let's say 275,000.

Q. 275,000 gallons.

(Deposition of Victor J. Dumbra.)

A. Oh, I don't know; $1, $1.10 or thereabouts; $1.12. I don't know. A quick calculation would show that we were paying a little more than $1 a gallon as far as we were concerned.

Q. I call your attention to Exhibits L and M offered in evidence in this proceeding, in both of which reference is made to 1,000 gallons which were drawn by Mr. Particelli, making a total of 274,000 gallons, which would be the net amount [38] under the contract; and also to the second paragraph on Exhibit N wherein reference is made to a $1,000 credit in favor of you against a sum of $1,500 which Tiara owed to Mr. Particelli for services rendered, and I ask you what does that $1,000 credit refer to (handing to witness)?

A. It is quite apparent from the letter that we were to pay Mr. Particelli $100 a week to take care of the winery.

Q. I am just asking you about that $1,000 credit. What was that credit for that you were to get on your debt to Mr. Particelli?

A. That's obvious here; he took 1,000 gallons out, and he allowed us $1,000 on that 1,000 gallons.

Q. I understand what the exhibits show. But I ask you whether the $1,000 credit was for that 1,000 gallons of wine that Mr. Particelli withdrew?

A. Oh, yes. Had we paid him the full amount, we would have expected $1,000 back in cash, definitely.

Q. Did Tiara Products Company ever operate the Lucca Winery, that is in the sense of crushing

(Deposition of Victor J. Dumbra.)

any grapes there, producing any wine?

A. Actually crush grapes, no. But factually we didn't because we then took another winery, a larger winery where we would do our crushing. That was one of the motives in our selling of this plant.

Q. What winery was that? [39]

A. The Cribari Winery.

Q. Where was that?

A. Ladrone and Fresno, California.

Q. When did you purchase that, do you recall?

A. The early part of '44.

Q. The early part of 1944? A. Yes.

(Discussion off the record.)

Q. Mr. Dumbra, I would like to ask you whether wine was in short supply in the year 1943?

A. I would like to say that wine was in great demand. There had been more made that year than in the year previous. So the demand was greater.

Q. I meant this in relation to the existing demand, was it hard to get, in other words?

A. Yes, oh, definitely wines were hard to get.

Q. I presume that the company intended to purchase wine with a view to making a profit on its resale, if possible? A. Oh, definitely.

Q. Were there any other considerations that were made by you as manager of the company in purchasing wine with respect, particularly, to its resale as a part of a general transaction; I am talking now about dry wine and the resale of dry wine as a part of a larger transaction involving the sale

(Deposition of Victor J. Dumbra.)

of other types of wine including sweet wine? [40]

A. Most definitely, always you look to enlarge your scope of trading and to enlarge your clientele. Let's say that all of these transactions were opportunities for us to get further entrenched with our customers.

Q. You mean in what way, becoming further entrenched with your customers for what reason?

A. Well, to get in a more varied type of operation than a localized one.

Q. Was it an advantage to the company merely to be able to sell some of your customers wine; was that one of the things?

A. It certainly was a big advantage to give them wine when they couldn't get it.

Q. At that time was there any inclination on the part of the company to purchase wines on a basis of, if necessary, not even making a profit on that particular resale of that particular wine in connection with a larger sale embracing sweet wines?

A. Possibly. But not factually done in most of our cases. If the market broke on us, and we got caught, well, we were out of luck, that's about all.

Q. Would you have purchased this wine from Mr. Particelli, and the winery, even though you might have known in advance, for example, that you could only have gotten $20,000 on the resale of the winery?

Mr. Brookes: I object, Mr. Marcussen. You realize [41] that it is an entirely hypothetical ques-

(Deposition of Victor J. Dumbra.)

tion. It is based upon a set of facts that has not been established to exist, or on a state of mind that has not been established to exist.

Mr. Marcussen: I will have to let the question stand in order to reflect the intention of Tiara Products Company—the full intention of Tiara Products Company in entering into this transaction in the first place.

Q. (By Mr. Marcussen): Do you understand the question, Mr. Dumbra?

A. Yes, I do. It is something I can't answer by saying yes or no, frankly. I mean, there are too many factors involved in it. Of course, we assume, at least in my mind I assumed that we would get about $50,000, $40,000 possibly, if we would sell the plant. Then if we ran the plant, there is no knowing what we might have made. So it is a question that would be difficult to answer.

Q. I thought I understood your testimony in the earlier part of your examination to be that the company had no intention of operating that winery when you purchased it? A. Well——

Mr. Brookes: Mr. Marcussen, might I interrupt to state that that is not what the record will show that the witness testified to. The record will show that the witness testified that they did not know at the time whether [42] they would have operated it. They would not know unless other conditions came along between the time of the purchase and the time of the next crushing season.

(Deposition of Victor J. Dumbra.)

A. I think you are correct, Mr. Brookes.

Mr. Marcussen: Then I will stand corrected by you and Mr. Brookes.

The Witness: I believe he is right.

Q. In other words, you might have operated it, is that what you mean to say?

A. Well, assuming we hadn't picked up this larger plant, we may have been obliged to run this plant if we saw fit to continue that type of operation. Obviously we didn't need the plant, and as time went on we sold it.

Mr. Marcussen: That's all.

Cross Examination

Q. (By Mr. Brookes): Mr. Dumbra, did you testify that you were president and general manager of Tiara Products Company? A. Yes.

Q. In your capacity as president, were you the officer who signed the income and excess profits tax returns for the company?

A. Possibly not. That might have been left to some officer of the company. But then I may have signed it. So I am not so sure. [43]

Q. You don't remember whether you would or not? A. No, I do not.

Q. Was the preparation of the income tax returns and the keeping of the corporate records under your supervision as general manager?

A. I am not a bookkeeper, but let me say that I was responsible for anything done with the company's books through our accountants.

(Deposition of Victor J. Dumbra.)

Q. Do you know, Mr. Dumbra, that the effect of having a large inventory on hand at the end of a taxable year is to increase the corporation's, or the taxpayer's taxable income for the year, and thus increase its taxes?

A. Will you repeat that, please?

Q. Do you know that the effect of having a high cost, or large volume of inventory on hand at the end of a taxable year is to increase the income and thus increase the tax?

A. Oh, that's right. It is obvious, yes.

Mr. Marcussen: Respondent objects to that and moves to strike the answer on the ground that the witness has testified that he does not know anything about accounting; and on the further ground that counsel has in effect asked the witness whether he knows something that in effect is not true. A large inventory at the end of the year does not increase the profits of the company. You can't state the proposition that baldly. It is not a complete question. [44]

Mr. Brookes: There may be——

Mr. Marcussen: If the other alternative were—it would certainly increase it if the only other alternative was to place that in as a cost, obviously if it were placed in at the—if the ending inventory were included as the cost for the year, that would increase the profits of the company, that would be true. That is rather obvious. But its removal wouldn't increase the profits without that first

(Deposition of Victor J. Dumbra.)

assumption. I think the question is therefore confusing.

Mr. Brookes: I will withdraw the question and ask it another way.

Mr. Marcussen: I think that would be better.

Mr. Brookes: With respect to your first objection, I think I should point out that I am entitled to find out how much about accounting the witness does know, since the witness has testified that as general manager he was in general supervision of the keeping of the corporate records.

Mr. Marcussen: I don't think he testified to that. I think that as general manager he has testified that he is responsible for everything that goes on in that company, including the proper keeping of the accounts. But not that it was done under his supervision. This man [45] doesn't know anything about accounting.

Mr. Brookes: Mr. Reporter, will you read back my question and the answer of the witness?

(The reporter read the previous question and answer as follows: "Q. Was the preparation of the income tax returns and the keeping of the corporate records under your supervision as general manager?

"A. I am not a bookkeeper, but let me say that I was responsible for anything done with the company's books, through our accounts.")

Mr. Marcussen: That is a far cry, I would say, Mr. Brookes, from stating that the accounts were kept under his supervision, except as he qualified

(Deposition of Victor J. Dumbra.)

it as the general manager.

Mr. Brookes: Mr. Marcussen, that's a distinction which I am unable to follow you on. But you are obviously quite free to draw the distinction yourself.

Mr. Marcussen: We will let respondent's objection to the question stand.

Mr. Brookes: My answer, which I will state for the record, is that I am entitled to find out the extent of this witness's knowledge of the matter for which he was responsible.

Q. (By Mr. Brookes): Mr. Dumbra, have you an understanding of the effect of [46] inventories in the determination of a taxpayer's income?

A. If you will be more specific.

Q. Do you know the difference between an opening inventory and a closing inventory?

A. Yes, definitely.

Q. What is the effect of an opening inventory?

A. Where you have an opening inventory, a closing inventory, which gives you, after you have added the purchases within that year, and the net amount of sales which, I think, are gross sales, then you have your expenses, and you narrow down the profit.

Q. Do you not mean that the opening inventory, the closing inventory and the purchases give you your cost of goods sold?

A. The inventory alone doesn't give you the cost of goods sold, no. Your overhead, your sales cost, incidentals, that would give you cost of goods,

(Deposition of Victor J. Dumbra.)

in my estimation, or rather that is the way I think it is computed.

Q. Did you mean to state that the inventory is a factor in determining the cost of goods sold or in the determination of your gross receipts?

A. What is that again, please?

(The previous question was repeated by the reporter.)

A. Your inventory determines—is part, let me say—inventory is part of the total picture that determines the [47] gross receipts and profit and loss. There can't be any question about that.

Q. Do you know, Mr. Dumbra, what effect on profit and loss the presence of a large inventory at the year-end would have?

A. That depends on what your inventory is priced at, or what it is brought in at, what your first in first out, or last in last out.

Q. Do you know which method Tiara was using in 1943?

A. We continually use one method.

Q. Which one?

A. We compute our cost accurately of merchandise brought in and compute our profit or loss on that basis.

Q. Do you mean that you were using cost as the sole basis of your inventory? A. Yes, sir.

Q. You did not use cost or market, whichever was lower? A. No, sir.

Q. Did you use first in first out or last in last out, do you remember?

(Deposition of Victor J. Dumbra.)

A. We used last in first out.

Q. Do you know what would have been the effect on your profit for 1943 had you purchased in late December, 1943, without selling—I would like to withdraw the question and restate it. [48]

Q. Do you know what the effect on your profits for 1943 would have been had you made a large purchase of inventory in the closing days of December of 1943 without being able to sell any of that inventory in 1943; would that have operated to increase your income for the year 1943 above what it would have been had you not made the purchase, or would it have decreased it?

A. No, I don't think it would affect us at all, because we would bring it in at the price bought, and that would stand on the books at that price.

Q. If the price bought was $77,000, the price paid is what you mean by price bought, is it not?

A. Yes, sir.

Q. Would you have put the inventory into your records and reflected it in your income, in your tax returns at $77,000?

Mr. Marcussen: Objection.

A. That is actually what was done. I have since learned that.

Mr. Brookes: Do I understand that you objected, Mr. Marcussen?

Mr. Marcussen: I will withdraw the objection.

Q. (By Mr. Brookes): Had you paid $274,000 for wine purchased in December of 1943 and put in your inventory, would the value at which you

(Deposition of Victor J. Dumbra.)

put it in the inventory have been $274,000 or $275,000? [49]

A. If that were the way be bought it, yes.

Mr. Marcussen: By that do you mean if that were the figure used in the contract?

The Witness: Definitely, that's what it means.

(Discussion off the record.)

Mr. Brookes: Mr. Marcussen, I understand that we have stipulated between us, subject to having the stipulation typed up and formally signed, that the records of Tiara Products Company, Inc.——

Mr. Marcussen: May I interrupt, Mr. Brookes?

Mr. Brookes: Yes.

Mr. Marcussen: I merely meant to suggest that that record show that we have entered into a written stipulation which has not been reduced to final form insofar as typing is concerned, concerning the testimony of Mr. Joe Brown, accountant for Tiara Products Company. And I stipulate——

Mr. Brookes: And the content of the records of the company.

Mr. Marcussen: And the contents of the records of the company. And I stipulate that you may use this rought draft that you now have in your hand in interrogating this witness, and you may, in interrogating him, assume that that is all in the record in this case.

Mr. Brookes: Thank you, Mr. Marcussen. It is so stipulated. [50]

Q. (By Mr. Brookes): Mr. Dumbra, it is stipulated that the corporate records of Tiara Products

(Deposition of Victor J. Dumbra.)

Company reflect a cost of the wine purchased from G. Particelli and his wife of $77,000 for the wine. It is also stipulated that that is the cost price at which the wine was carried into the closing inventory of 1943, and the opening inventory of 1944 in your income tax and excess profits tax returns.

I understood you to state during the direct examination in response to a question by Mr. Marcussen that in your mental calculations in approving in the telephone conversation with your brother his purchase of the wine and the winery from Mr. Particelli, that, to repeat, in your mental calculations you figured roughly that you were buying the wine from Mr. Particelli at about $1 a gallon, or $1.10 a gallon?

A. That's correct; $1, $1.10, I said.

Q. But the record also shows that you purchased 275,000 gallons. Can you explain why the corporate records do not show, then, a cost price for this wine of $275,000 or more?

A. Yes, I think I can.

Q. Will you explain it, please.

A. If we agreed to buy that wine at $1, $1.10, that is the figure that would show on our records. But the agreed price of the wine was 27 or 28 cents—I am always hazy of these figures. But that certainly had no bearing, in my estimation, [51] of what I thought the value of the wine was, and what we could get back for it.

Q. Then am I correct in now understanding that when you answered Mr. Marcussen, as you did,

(Deposition of Victor J. Dumbra.)

you intended to convey the thought that you were estimating what the wine would be worth to you in view of your selling price, and your position in the trade in New York?

A. Definitely. Only to our company, and I am not establishing any value of wines. Only to our company, knowing what the return was on a per case or a per gallon basis.

Q. In view of what your records and your income tax returns show, then what is the price which you understand Tiara Products Company paid for the wine?

A. The records absolutely show 28 cents, or 27 cents, whatever is in that agreement.

Q. Do you remember the numbers of thousands of dollars for the entire batch of wine?

A. $77,000.

Q. Now, Mr. Dumbra, was the wine at the time you bought it from Mr. Particelli fit for immediate use by you in your business? A. By us, no.

Q. What did you have to do to it?

A. Whatever wines we handle—let me say all wines that me might handle would be blended, processed—when I say "processed" [52] I mean clarified, refrigerated, pasteurized, filtered, and subsequently bottled. So I am saying the processes that a normal wine would go through.

Q. Is that process sometimes called finishing?

A. Yes, sir.

Q. Proceed with your answer, please. Did you

(Deposition of Victor J. Dumbra.)

answer me that you had to do these various processes?

A. For those wines that we bottled up. But not necessarily on the bulk of the wine.

Q. What did you do to the bulk of the wine?

A. Some of it was sold in ten-car lots without processing to other producers, possibly, or bottlers.

Q. Would they have to perform any of these services for the wine before selling it in bottles?

A. That is a question I can't answer. They might and they again didn't have to.

(Discussion off the record.)

Q. Was this wine in what is considered generally to be a marketable condition at the time you bought it?

A. Again that would depend on the firm buying it. As far as we were concerned it was in an unfinished state.

Q. Did you state that you blended this wine that you bought from Mr. Particelli with other wine prior to selling it yourselves?

A. We blended some of it up, yes, sir. [53]

Q. What wines would you use for blending with it?

A. Oh, we might use a little colored wine, we might use a light-bodied wine. That would depend on the wine itself, quite frankly.

Q. What proportion of other wine would you add to the Particelli wine in blending it to make it finished?

A. Again, that would depend on the type we

(Deposition of Victor J. Dumbra.)

are trying to get at. If it were burgundy we would use more of it, which is a heavy wine. If it were going into a claret, we would use less.

Q. What was the variety of the red wine which you purchased from Particelli?

A. I would say, generally speaking, a heavy colored——

Q. Excuse me; I didn't mean that; I meant the variety.

A. We would catalogue them as heavy red wines. You wouldn't say—it is zinfandel mostly.

Mr. Marcussen: Red or white?

The Witness: Oh, no, mostly red.

Q. (By Mr. Brookes): I asked red.

A. And I replied——

Q. Then you said the red was zinfandel?

A. I think mostly zinfandel.

Mr. Brookes: Off the record.

(Discussion off the record.) [54]

Q. (By Mr. Brookes): Mr. Dumbra, you testified that you had certain ceiling prices for the sale of your own product, and you testified generally to what they were. Did those ceiling prices relate to vermouth as well as table wine? A. Yes, sir.

Q. So when you averaged out, as you did, in getting your price, your ceiling was about $7 a case, you were referring to vermouth among other wines? A. Generally speaking, yes.

Q. Was not your ceiling price for vermouth higher than the ceiling price for wine?

A. Yes, we had a higher ceiling, definitely.

(Deposition of Victor J. Dumbra.)

Q. Was the zinfandel which you purchased from Mr. Particelli suitable for making into vermouth?

A. You could use it.

Q. You use a red wine in making vermouth?

A. You couldn't use a big percentage of it. You might use about five per cent in a batch, and that is negligible. But you do not use red wine in making vermouth. I say it can be used, but you do not use it.

Q. Yes. I suppose if you made it it would resemble dubonnet more than vermouth?

A. That's right, it would be suitable for dubonnet, the type of dubonnet wine. [55]

Q. Do you recall what your ceiling price was on table wine? A. Yes.

Q. What was it?

A. I know we were better than six and a half on reds, and about seven and a half on whites. About seven average.

Q. On table wines? A. Yes, average.

Q. Does that include tax? A. Yes, sir.

Q. When you referred to your bulk ceiling on reds as being $1.10 a gallon to $1.25 a gallon, you were referring to red table wines?

A. That's right.

Q. Did that include the tax?

A. No, sir, bulk wines are considered always sold naked, in bond.

Q. Did the OPA apply a different ceiling price to wines which you sold from the Lucca Winery than these that you are referring to?

(Deposition of Victor J. Dumbra.)

Mr. Marcussen: Excuse me, may I have that question repeated?

(The previous question was repeated by the reporter.)

Mr. Brookes: Off the record.

(Discussion off the record.) [56]

Mr. Brookes: Mr. Marcussen, I would like to have you stipulate as follows with respect to this witness's understanding concerning the application of the OPA Rules and Regulations pertaining to the resale by Tiara Products Company of wines purchased by it in connection with transactions whereby Tiara purchases a winery together with its inventory of wine:

Tiara Products Company purchased a number of wineries in California and their inventories of wine. At the time of such purchases it was the understanding of this witness as president and general manager of Tiara Products Company that Tiara Products Company was permitted under the applicable rules and regulations of the OPA to resell the wine thus acquired at its, Tiara Products Company, ceilings for wine both for bulk and for case goods.

Toward the end of 1944 the witness learned that he was partially mistaken in his understanding. He learned that Tiara Products Company would be permitted to use its ceilings upon the resale of wine purchased in the manner just described only in such instances where Tiara Products Company first effectuated a delivery of such wine from the

(Deposition of Victor J. Dumbra.)

purchased winery to the original facilities of Tiara Products Company and delivery to the customer from such facilities.

He learned, for example, that if the sale of wine [57] purchased in the manner described was effectuated by a direct delivery of such wine from the purchased winery to the customer, that the ceiling applicable to such sales was the ceiling of the purchased winery.

Mr. Marcussen: It is so stipulated.

(Discussion off the record.)

Mr. Brookes: In view of that stipulation into which we have just entered, I conclude my cross examination.

Redirect Examination

Q. (By Mr. Marcussen): Mr. Dumbra, will you please state your best recollection of what disposal was made of the wines purchased at the Lucca Winery from Mr. Particelli?

A. Some of the wines went to affiliated wineries, some came east to us for subsequent blending out, and some were sold direct to our customers.

Q. Approximately what percentage was sold direct to other customers?

A. I guess maybe 50 per cent, 40 per cent; I am not too sure.

Q. There was considerable questioning on cross examination with respect to the use of a figure of $77,000 representing the cost of the wine that was purchased from Mr. Particelli in this transaction.

(Deposition of Victor J. Dumbra.)

When you used the figure of $77,000 as you testified, was that because you had undertaken, or [58] rather Mr. Dumbra, your brother, John Dumbra had undertaken with Mr. Particelli that the contract could be handled in any manner satisfactory to Mr. Particelli insofar as its wording was concerned?

A. I believe I stated that prior to this question. Any deal that Mr. Mull, our attorney, would pass on would be agreeable to us.

Q. The use of a figure of $77,000 for the cost of the wine on your books did not reflect, did it, your own opinion of the actual cost of that wine to the Tiara Products Company?

A. Well, actually that was what we paid for the wine plus the purchase price of the winery. But in selling it we didn't—at least I didn't figure that that wine was only worth 28 cents a gallon, or $77,000.

Q. I am not talking about your selling price, I am talking about purchasing it. What did you figure that you were paying for wine when you entered into this transaction with Mr. Particelli, regardless of the specific terms of this agreement?

A. Let me say that out of the $350,000 I made a mental reservation of the figure on the plant and the balance on the wine. Whether the figure was fifty, sixty, forty thousand dollars, I don't remember.

Q. You mean for the winery? [59]

A. For the winery.

(Deposition of Victor J. Dumbra.)

Q. And the balance for the wine?

A. That's the way I computed it. Wrongly or rightly, that's the way I computed it.

Q. Is that what you had in mind when you authorized your brother to enter into this transaction on the telephone? A. Oh, yes.

Q. With respect to the sale of bottled dry wines such as were purchased in bulk from Mr. Particelli in this transaction, what were your ceilings?

A. Our ceilings were on an average of $7 for our wines; mostly, or possibly $6.50, the red; $7.50 for the white wine, within that range.

Q. Was it those ceilings that you had in mind when you testified that you could net approximately $2 a bottle without figuring in the cost of the wine itself?

A. If you will change that to $2 a gallon I think you meant gallon.

Q. I beg your pardon, you are correct; $2 a gallon. A. Then I would say yes.

Q. Thank you for correcting me. So that the record may be clarified on this subject, I am not quite certain just what it contains with respect to your testimony about your ceilings for the sale of bulk wines.

I think you testified that those ceilings varied [60] from $1.10 to $1.25, and I ask you are those the ceilings that you had for the type of wine that was sold in bulk by you represented by purchases from the Lucca Winery, for example?

A. Within that range, yes.

(Deposition of Victor J. Dumbra.)

Q. When you said that you were responsible for the bookkeeping and the accounting for the transactions entered into by Tiara Products Company, in what capacity were you responsible for such matters?

A. Well, as its general manager you might call me responsible for everything that went on in my company, or this company, without having specific knowledge of what the detail work was.

Q. Do you have a complete understanding of accounting and bookkeeping matters, actually?

A. Oh, definitely not.

Q. Again I want to ask you as to whether you sent your brother John out to California with instructions to get a winery prior to the time that this purchase of the Lucca Winery was made?

A. Well, my brother's assignment was broad, as I stated, to find wine. Subsequently wineries came with wine, we bought wineries.

Q. Is it your testimony that you bought this winery because it was necessary to get it in order to get the wine?

A. Well, if we wanted the wine, it is quite obvious we [61] had to buy the plant with it, so we bought the plant.

Mr. Marcussen: That's all.

Recross Examination

Q. (By Mr. Brookes): Mr. Dumbra, in view of the important part which you played in the acquisition of the Lucca Wine and Winery, and in view

(Deposition of Victor J. Dumbra.)

of the further fact that you were president and general manager of Tiara Products Company, did you feel that it was your responsibility to be certain that the books of account of the corporation properly reflected the transaction?

A. Oh, yes, at all times I wanted it to reflect exactly what the transaction was.

Q. Mr. Marcussen has attempted to put you in the position of testifying that you recorded fictitious figures on the records of account.

Mr. Marcussen: I am sure I have not attempted to place the witness in any such position, Mr. Brookes.

Mr. Brookes: Well, the record will speak for itself. If you haven't been busy impeaching your own witness, I have never seen a more beautiful example of it. I will withdraw that for the purpose of interrogating the witness. But you will see for yourself what you have done when it is read in front of you.

Mr. Marcussen: There has been certainly no intention; I have had no intention to do anything of the kind. [62]

Q. (By Mr. Brookes): Did you consider that the $77,000 cost price of the wine that is on the books of account of Tiara Products Company is a fictitious figure? A. Oh, no, never.

Q. Would you consider that it was the real cost to you of the wine? A. Definitely.

Q. That is why it was used in the income tax returns as the cost of the wine?

(Deposition of Victor J. Dumbra.)

A. Most assuredly.

Mr. Brookes: That is all.

Further Redirect Examination

Q. (By Mr. Marcussen): Did you use it as the cost for the wine because it was the figure appearing in that contract? A. Definitely.

Q. Is that the reason?

A. That's the reason, the contract read that the price for the wine, and that is what was on the books, and that's the way we reflected it.

Q. And you had an understanding with Mr Particelli that it didn't make any difference how it was handled, and you would handle it under the contract in the manner in which Mr. Particelli wanted it? [63]

A. Let me say that we—I personally didn't have the understanding. We were concerned with how it was set up provided again, as I say, our attorneys saw to it that we had a legal bill of sale.

Q. And didn't you instruct your brother John on the telephone, when he asked you, that it was all right to set this contract up in any form which Mr. Particelli desired provided that it was approved by your attorney?

A. Yes, I think I have stated that before.

Q. That is the substance of your testimony?

A. Oh, yes.

Q. And I ask you again, now—counsel, I think, has attempted to draw an inconsistency in your testimony. I think you testified a moment ago that

(Deposition of Victor J. Dumbra.)

so far as you were concerned you regarded the actual cost of this wine to be approximately $300,000 for the entire batch, and that the balance of the difference between that and the total figure to be approximately what it was costing you for the winery?

A. I say, that was my mental observation.

Q. Yes.

A. But it didn't reflect that on the books.

Q. You didn't reflect that on the books, and what was the reason you didn't reflect it on the books?

A. The contract is the obvious answer.

Mr. Marcussen: Exactly. [64]

That's all.

Mr. Brookes: I have no further questions.

(Whereupon, at 4:15 o'clock p.m., the hearing in the above-entitled matter was concluded.)

Certificate

I, Maxwell S. Lipton, the person who took the foregoing depositions, hereby certify:

1. That I proceeded on the 14th day of June, 1950, at the office of Buchman & Buchman, in the City of New York, State of New York, at 1:45 o'clock p.m., under the said order and in the presence of Valentine Brookes, Esq., and Leonard Allen Marcussen, Esq., the counsel for the respective parties, to take the following depositions, viz:

John Dumbra, a witness called on behalf of the respondent;

Victor J. Dumbra, a witness called on behalf of the respondent.

2. That each witness was examined under oath at such time and place, and that the testimony of each witness was taken stenographically and reduced to typewriting by me or under my direction.

3. That Respondent's Exhibit DD was withdrawn by Respondent in accordance with the previous permission granted by the Court.

4. That I have no office connection or business employment with the petitioner or his attorney.

[Seal] /s/ MAXWELL S. LIPTON,
Notary Public, State of New York, No. 24-2377350. Qual. in Kings County Cert. filed with Kings and New York Co. Clerks. Commission expires March 30, 1951.

[Endorsed]: Filed July 19, 1950. [66]

[Endorsed]: No. 13503. United States Court of Appeals for the Ninth Circuit. Giulio Particelli, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Estate of Eletta Particelli, Deceased, and Arthur Guerrazzi, Executor, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review a Decision of The Tax Court of the United States.

Filed: August 22, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13503

GIULIO PARTICELLI,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

ESTATE OF ELETTA PARTICELLI, Deceased,
ARTHUR GUERRAZZI, Executor,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITIONER'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

The points on which petitioners intend to rely are as follows:

1. The Tax Court erred in admitting, over petitioners' objections, evidence tending and offered by respondent in order to show petitioners had committed crimes of which neither of them had been convicted. This evidence was not relevant to any issue in the case and was offered solely to impeach the testimony of one of petitioners.

2. The Tax Court erred in admitting, over petitioners' objections, irrelevant evidence prejudicial in character.

3. The Tax Court erred in finding facts which

were based solely on hearsay evidence elicited from an expert witness to establish his qualifications to testify as an expert to wine values. The hearsay evidence was admissible only for the limited purpose of establishing and testing an expert's qualifications, and was incompetent for all other purposes. The Tax Court erred in considering it for other purposes.

4. The Tax Court erred in failing to give effect to testimony identifying and establishing the nature and ordinary selling price of wine withdrawn by petitioners after the sale of their wine and winery.

5. The Tax Court erred in finding that Tiara Products Company sold the winery in December, 1944 for $20,000.

6. The Tax Court erred in failing to give effect to testimony of respondent's witness, John Dumbra, that he was not certain he was able to understand petitioner Giulio Particelli in his preliminary negotiations with him.

7. The Tax Court erred in finding as a fact that the purchaser of the wine "considered that it was paying from $1 to $1.12 per gallon for the wine acquired from petitioner.

8. The Tax Court erred in holding that the terms of the written contract of sale between petitioners and Tiara Products Company could be disregarded by the Commissioner of Internal Revenue, in the face of proof that not only the seller but also the purchaser faithfully performed the terms of that contract.

9. The Tax Court erred in holding that prelimin-

ary negotiations by which neither party to a subsequent written contract was bound superseded the terms of the written contract.

10. The Tax Court erred in holding that a written contract was a sham which the Tax Court and respondent could both disregard where it was entered into freely, without compulsion, by unrelated parties, both of whom observed its terms in their subsequent conduct.

11. The Tax Court erred in assigning a value in excess of the O.P.A. ceiling price to a commodity the price of which was controlled by governmental regulation.

12. The Tax Court erred in allocating a value of $275,000 to the wine sold by petitioners to Tiara Products Company.

13. The Tax Court erred in finding that "Dumbra did not at any time agree to purchase the wine for $77,000 and the winery for $273,000."

Petitioners designate the following portions of the record:

1. The pleadings.

2. The stipulation of facts, with attached exhibits.

3. Stipulation of Facts, II.

4. All the testimony of Giulio Particelli.

5. The following testimony of Philip Branger: that appearing in the in the reporter's transcript at p. 167 through the following: "A. Yes, it was in the early part, I believe it was in December;" on page 170 of the reporter's transcript the following question: "Q. Mr. Branger, what did you pay for the

winery when you purchased it?"; on page 173 of the same the following: "The Witness: $22,000"; page 174 to the last question on page 176 of the reporter's transcript.

6. All the testimony of Mrs. Arthur Guerrazzi.

7. All the testimony of George Oefinger.

8. All the testimony of A. M. Mull, Jr.

9. The following testimony of Robert Mondavi: that appearing in the reporter's transcript at pages 276, 277, 281-284, the last four lines of page 302, all of pages 303-313, and on page 314 through the close of the cross-examination.

10. The testimony of Fred J. Foster.

11. The testimony of Louis R. Gomberg.

12. The testimony of Glenard Gould.

13. In the deposition of H. L. Hotle, the portion of the direct examination appearing on pages 2, 3, and on page 4 before the following: "Mr. Marcussen: Now, you were just referring——".

14. The deposition of John Dumbra.

15. The deposition of Victor J. Dumbra.

16. Exhibit 10.

17. Exhibit W.

18. The memorandum findings of fact and opinion of the Tax Court, dated February 20, 1952.

19. The decisions of the Tax Court dated May 1, 1952.

20. The petition for review.

21. The notice of filing petition for review.

22. Petitioners' statement of points and designation of record.

23. Any designation of record by respondent.

Dated at San Francisco, California, August 25, 1952.

Respectfully submitted,

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Attorneys for Petitioners

[Endorsed]: Filed Aug. 26, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBITS

The parties hereto stipulate, through their counsel and subject to the approval of the Court, as follows:

1. That all the exhibits contained in the record transmitted by The Tax Court of the United States may be referred to by the parties in the briefs and arguments and may be considered by the Court to the same extent as if included in the printed record; and

2. That in order to avoid excessive printing costs none of the exhibits need be printed, excepting only Exhibits A-1 to I-9, inclusive.

Respectfully submitted,

/s/ VALENTINE BROOKES,
/s/ ARTHUR H. KENT,
Attorneys for Petitioners on Review
/s/ ELLIS N. SLACK,
Acting Assistant Attorney General,
Attorney for Respondent on Review

So Ordered.

/s/ WILLIAM DENMAN,
Chief Judge

/s/ HOMER T. BONE,
Circuit Judge.

/s/ WM. E. ORR,
Circuit Judge.

[Endorsed]: Filed Sept. 19, 1952. Paul P. O'Brien, Clerk.

United States Department of Justice
Washington 25, D. C.

Air Mail—Special Delivery Sept. 5, 1952

Paul P. O'Brien, Esq.,
Clerk, U. S. Court of Appeals for the Ninth Circuit,
P.O. Box 547, San Francisco 1, California

Re: Giulio Particelli vs. Commissioner of Internal Revenue; Estate of Eletta Particelli, Deceased, Arthur Guerrazzi, Executor, vs. Commissioner of Internal Revenue (No. 13503, C.A. 9th)

Dear Mr. O'Brien:

Reference is made to the petitioners' letter to you dated August 25, 1952, enclosing their Statement of Points to be relied on, and Designation of Portions of the Record proposed—presumably to be printed—in the record upon review, in the above cases, copies of which were sent to and received by the Chief Counsel, Bureau of Internal Revenue this city, on August 27, 1952—instead of this office—

No. 13,503

IN THE

United States Court of Appeals

For the Ninth Circuit

GIULIO PARTICELLI,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ESTATE OF ELETTA PARTICELLI, Deceased,
Arthur Guerrazzi, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Review of The Tax Court of the United States.

PETITIONERS' OPENING BRIEF.

VALENTINE BROOKES,
ARTHUR H. KENT,
1720 Mills Tower, San Francisco 4, California,
Attorneys for Petitioners.

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No. 13,503

IN THE

United States Court of Appeals

For the Ninth Circuit

GIULIO PARTICELLI,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ESTATE OF ELETTA PARTICELLI, Deceased,
Arthur Guerrazzi, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Review of The Tax Court of the United States.

PETITIONERS' OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This case was instituted by petitions filed in the Tax Court within ninety days of the date on which the deficiency letters were mailed. (R. 9, 22, 25, 31, 33.) As Eletta Particelli had died a few days previous to the execution of the petition, it was verified, as required by the rules of the Tax Court, by the person named as

executor in her will. (R. 30-31.) After his formal qualification as executor, a motion to confirm was granted (R. 35), and the title of the case was changed by order of the Tax Court (R. 34). After hearing on the merits, decisions of the Tax Court were entered on May 1, 1952, finding a deficiency in income and victory tax in each case of $50,135.36 for the taxable year 1943. (R. 80, 81.) Petitions for review by this Court were filed on July 21, 1952, and served on July 23, 1952 in each case. (R. 84, 85, 88, 89.) An order consolidating the two cases was entered by this Court on August 1, 1952 (R. 91), pursuant to stipulation of the parties (R. 90). The jurisdiction of this Court is founded on Sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The relevant facts found by the Tax Court, stipulated to, or established by uncontradicted evidence not rejected by the Tax Court, may be summarized as follows:

Petitioner Giulio Particelli[1] is a resident of Sebastopol, California. (R. 59.) He was born in Italy in 1891. He cannot read English, and while he both speaks and understands it, his spoken English is a somewhat broken dialect which those not accustomed to it find difficult to understand. (R. 60.)

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[1]The other petitioner had no part in the facts, being involved only because of her community property interest. (R. 59.) For that reason, we shall hereinafter refer to Giulio Particelli as "petitioner".

Petitioner dealt in wine. Shortly after the repeal of Prohibition he began making wine on a small scale on his farm, and his operations grew until in 1941 he began and in 1943 completed the construction of a new and larger winery at Forestville, California. (R. 60.) The winery was equipped to crush grapes and ferment the juice into wine, to rack, filter and store 256,000 gallons of wine, but not to finish it. In addition, about 300 feet away from the winery petitioner had a bottling plant and retail store, where he bottled and sold wine of his own vintage as well as better grades of wine purchased from other wineries. (R. 60-61.)

Prior to the completion of the 1943 crush in November of that year, he sold wine of his own vintage for prices ranging from 32 cents a gallon when sold in 50-gallon containers to 38 cents a gallon in 5-gallon containers. This price included federal and state alcoholic beverage taxes totalling 11 cents a gallon. (R. 61.) Petitioner's 1943 crush was begun in September and completed in November of that year. It totalled 245,000 gallons and was added to that which he had on hand from his 1942 crush. The cost of the 1943 crush was from 50 cents to 52 cents a gallon. (R. 61.) This cost exceeded the ceiling price of 28 cents a gallon before taxes which petitioner was permitted to charge for bulk sales of wine of his own production (R. 65), because petitioner and other wine producers had expected that OPA would increase the ceilings by the added 1943 grape costs (R. 61-62). This the OPA did not do. (R. 316, 441.)

Petitioner could not obtain the higher ceiling price allowed for bottled goods unless he could finish his wine,

because if bottled before being finished it would cloud and spoil. He was unable to finish his wine, and the winery which had on occasion finished his wine for him before refused to do so again. (R. 62.) After the 1943 crush petitioner was indebted to the Bank of Sonoma County for $70,000. (R. 62.)

Wine was in great demand (R. 62-63), and ceiling prices varied widely (R. 72). To illustrate this, petitioner's ceiling was 28 cents a gallon before tax (R. 65), whereas Tiara Products Company, Inc., the purchaser from petitioner, had a ceiling for wine of that sort of $1.10-$1.25 a gallon on bulk sales and a ceiling on bottled sales which returned it $2.00 a gallon net (R. 599-600, 620). This situation caused bulk sales of wine virtually to disappear, except where sold with the winery in which the wine was stored. (R. 63.)

In December, 1943, John Dumbra approached petitioner on behalf of his principal, Tiara Products Company, Inc., of New York, with an offer to buy four cars of his wine. Petitioner's reply was that he could not make a profit on sales of wine in such quantities. (R. 64.) In making this remark, petitioner had in mind his cost of production of about 50 cents a gallon and his ceiling price of 28 cents a gallon (R. 73, footn.), and Dumbra so understood (R. 581), although petitioner's ceiling price was not actually discussed (R. 64). Dumbra testified that petitioner then stated that "he would consider selling all of the wine and the winery together, because he wanted to get out of business". (R. 573; and see R. 73.) Petitioner then offered to sell his wine and winery for $350,000. Dumbra did not accept this offer but made a counter-offer of

$330,000, subject to the approval of his principal. (R. 64.) Dumbra then telephoned his brother, Victor Dumbra, president of Tiara Products Company, Inc., who was in New York, and obtained his authorization to go up to $350,000, if necessary. (R. 575-576.) Later Dumbra told petitioner he would pay $350,000 (R. 576), and Dumbra testified that petitioner then told Dumbra to meet him in his lawyer's office in San Francisco the next day or so, when he would have the written contract prepared (R. 576-577; R. 65). In that same conversation, petitioner told Dumbra the contract would specify one price for the wine and another for the winery, and Dumbra agreed (R. 65, 577.)

The two men met in the office of petitioner's accountant in San Francisco a day or so later. (R. 65.) This accountant was a certified public accountant and a partner in one of the large national accounting firms. (R. 261-262.) He had advised petitioner previously that in a sale of wine and winery he would have to sell the wine at the price ceiling established by the OPA for the bulk sale of wine. (R. 264.) The attorney who prepared the written contract of sale had previously advised petitioner not to sell at a price in excess of any ceiling. (R. 397.) At petitioner's request, the accountant, at this meeting in his office, computed the ceiling applicable to the sale at 28 cents a gallon, and so advised petitioner. (R. 65, 264-265.) The attorney was then called in to prepare the sales agreement, which he did pursuant to instructions he received from petitioner in John Dumbra's presence. (R. 398.) Petitioner and John Dumbra then signed the written contract. (R. 65, 269.)

The written contract appears in full in the record, as Exhibit A-1 to the stipulation of facts. (R. 45-46.) It is a written agreement to buy and sell a winery complete with equipment for $273,000, and 275,000 gallons of wine for $77,000. The contract expressly excludes from its terms a bottling plant owned by petitioner.

Fifteen days after the contract was signed, the purchaser, Tiara Products Company, Inc., delivered to the escrow agent two separate escrow instructions. (Exh. B-2, R. 46-47; Exh. D-4, R. 48-50.) One of them instructed the agent to deliver $77,000 to petitioner on its receipt from him of a bill of sale to 256,000 gallons of wine stored in petitioner's winery and 19,000 gallons stored elsewhere. (Exh. B-2, R. 46-47.) The other instructed the agent to pay $268,000 (the balance on $273,000 after deducting a $5,000 deposit) to petitioner on its receipt from him of the deed to the winery and bill of sale to the equipment. (Exh. D-4, R. 48-50.) Petitioner delivered two separate escrow instructions to the agent, which were similar to the buyer's instructions. (Exh. E-5, R. 50-51; Exh. F-6, R. 51.)

After the transaction was closed, petitioner remained on the winery premises for several months as caretaker and to supervise for the account of Tiara the shipment of the wine. (R. 69.) Before the sale was closed petitioner withdrew, with the consent of Tiara, 1,000 gallons of wine for his personal use. (R. 69.) He later was charged $1,000 for this wine. (R. 69-70.) He testified that this wine was not of his own production but was high-quality Italian Swiss Burgundy, the type he had sold at his retail store for $1.10-$1.20 a gallon. (R. 200, 214-215, 216, 217.)

Tiara entered the balance of the wine on its books at a cost of $77,000, and entered the winery on its books at a cost of $273,000. (R. 68.) It used these cost figures in its federal income and excess profits tax returns. (R. 68.) It did these things because the contract fixed those prices for those properties. (R. 68.)

Subsequent to the purchase by it of petitioner's winery, Tiara purchased another winery, which was larger and better equipped. (R. 602, 605.) Tiara no longer needed the Particelli winery, so decided to sell it. (R. 602, 605.) In the meantime the market broke (R. 69, 598, 603), and the winery was actually sold for $20,000 (R. 69).

Other facts are found by the Tax Court or referred to in the opinion which we consider irrelevant or do not accept as properly supported. They are discussed in the argument, infra.

Petitioner's tax returns were filed on the basis of the wine's having been sold for $77,000 and the winery for $273,000. The allocation of that sales price to the winery resulted in a capital gain of $217,634, under Internal Revenue Code Section 117(j). (R. 15.) The Commissioner reallocated the purchase price to allocate $302,500 to the wine and $47,500 to the winery. (R. 15.)[2] Deficiencies of $62,222.85 were assessed against each petitioner (R. 11, 31), which the Tax Court redetermined at the figure of $50,135.36 for each petitioner (R. 80, 81), the reduction being the result of the disposition of certain minor issues by stipulation of the parties and the reallocation of the

[2]Other adjustments were also made which were settled by stipulation of the parties in the Tax Court. They are not involved in this appeal and therefore are not further identified or discussed.

purchase price to $275,000 for the wine and $75,000 for the winery (R. 70).

SPECIFICATION OF ERRORS.

1. The Tax Court erred in admitting, over petitioner's objection, evidence tending to establish that petitioner had committed a crime, of which he had never been convicted. This evidence was not relevant to any issue in the case and was offered solely for the purpose of impeachment.

2. The Tax Court erred in holding that the Commissioner and it had authority to reallocate the prices fixed for different items of property in a written contract entered into freely by unrelated parties, neither under any compulsion to buy or sell, in the absence of evidence that the parties regarded the price allocation as a sham.

3. The Tax Court erred in failing to find that 1,000 gallons of wine which petitioner withdrew for a price of $1,000 prior to the closing of the transaction differed materially from the wine actually sold to Tiara, in that the wine withdrawn was a quality wine produced by another vintner and theretofore sold by petitioner for prices ranging from $1.10 to $1.20 a gallon, and the balance of the wine was unfinished wine produced by petitioner and theretofore sold by him for prices ranging from 32 cents to 38 cents a gallon, tax included.

4. The Tax Court erred in failing to give effect to the testimony of respondent's witness, John Dumbra, to the effect that he never was certain that he clearly understood petitioner.

5. The Tax Court erred in finding as a fact that the purchaser of the wine "considered that it was paying from $1 to $1.12 per gallon for the wine acquired from petitioner."

6. The Tax Court erred in finding that "Dumbra did not at any time agree to purchase the wine for $77,000 and the winery for $273,000."

7. The Tax Court erred in assigning a value and hence a price to the wine in excess of the OPA ceiling price.

SUMMARY OF ARGUMENT.

I. During the course of the trial respondent offered certain evidence which, by his own statement, tended to show that petitioner had made sales of wine at over-ceiling prices. He justified the offer on the ground that the evidence would impeach petitioner. Petitioner objected to the admission of the evidence on the ground that evidence of the commission of acts constituting a crime for which the party had never been convicted was improper, particularly when offered for impeachment. The Tax Court overruled the objection and admitted the evidence.

In this ruling, the Tax Court committed reversible error. The rules of evidence in the District of Columbia, which the Tax Court is required by statute to apply, do not permit the admission of evidence tending to show commission of unconvicted crimes, for purposes of impeachment. The rule is the same in civil as in criminal cases. *Chebithes v. Price* (C.A. D.C., 1930), 37 F. 2d

1008; *Campion v. Brooks Transp. Co.* (C.A. D.C., 1943), 135 F. 2d 652 (per Vinson, J.); *Sanford v. United States* (C.A. D.C., 1938), 98 F. 2d 325, 327. The rule is the same in this Court (*Dawson v. United States* (C.A. 9, 1926), 10 F. 2d 106, cert. den. 271 U.S. 687), in the United States Supreme Court (*Michelson v. United States* (1948), 335 U.S. 469), and has been specifically applied to proof of unconvicted violations of the Emergency Price Control Act (*United States v. Klass* (C.A. 3, 1947), 166 F. 2d 373).

The damaging effect of the error is evident from the fact that the Tax Court consistently discredited petitioner's testimony wherever it could possibly be deemed to be contradicted by any other evidence in the record. Moreover, the Tax Court even made a finding that petitioner had made a large sale at an over-ceiling price, a finding irrelevant for any purpose but to discredit petitioner.

II. The Commissioner and the Tax Court both lacked authority to ignore the terms of the written contract. The reliance on negotiations which were intended by the parties to be superseded by the integrated contract is contrary to established principles. The parties who made the contract were unrelated, neither was under the control of the other, and neither was under any compulsion to buy or sell. Both parties complied with the terms of the contract in their subsequent conduct. The fact that the buyer, who is not the party before the Court, entered the contract figures in its books and tax returns as reflecting the real prices it paid is final evidence that the contract prices were not sham.

The Commissioner and the Tax Court have no authority to substitute their judgment of what the prices should have been for that of the parties in these circumstances. Taxpayers have the right to conduct their own business affairs, and the tax administrator must accept them as he finds them in the absence of sham. *Twin Oaks Co. v. Commissioner* (C.A. 9, 1950), 183 F. 2d 385; *Hypotheek Land Co. v. Commissioner* (C.A. 9, 1953), 200 F. 2d 390.

III. The Tax Court made a series of findings which are unsupported by any evidence. This Court is not bound by findings of the Tax Court unless substantial evidence supports them, or unless they settle a conflict in the evidence. The Tax Court is not at liberty to reject uncontradicted evidence not improbable in character. *Grace Brothers, Inc. v. Commissioner* (C.A. 9, 1949), 173 F. 2d 170, 174.

IV. (a) The wine petitioner sold to Tiara Products Company, Inc. was no different and no more valuable than wine petitioner had sold throughout 1943 at 32-38 cents a gallon, tax included. These prices were below the lawfully established ceiling price effective in December, 1943, which was 28 cents a gallon plus taxes of 11 cents a gallon. In sales on the open market, petitioner could not have lawfully realized more than 28 cents a gallon for his wine. This price was its fair market value, which is not properly to be determined by reference to devices for circumventing the ceilings of which petitioner was ignorant.

(b) The rule is well established in condemnation cases that the United States need pay only market value for property it takes. The Supreme Court has held that

goods requisitioned by the United States need be paid for by it only at the lawful ceiling prices applicable to sales in the open market, and rejected the suggestion that special means of selling for over-ceiling prices should be considered. *United States v. Commodities Trading Corp.* (1950), 339 U.S. 121. The Government, which creates these ceilings, cannot be permitted to take full advantage of them when its obligations are concerned, and then to avoid their effect where its rights are concerned.

ARGUMENT.

I. THE TAX COURT ERRED IN ADMITTING OVER OBJECTION EVIDENCE TENDING TO ESTABLISH THAT PETITIONER HAD COMMITTED A CRIME, OF WHICH HE HAD NOT BEEN CONVICTED.

During the course of the trial respondent's counsel offered evidence tending to establish that earlier in 1943 petitioner had made sales of wine at over-ceiling prices. The purpose of the proffered evidence was explained by respondent's counsel as follows (R. 523-524):

> "* * * to show that there were other sales during the year, must have been other sales during the year at higher than ceiling prices."

Petitioner's counsel at once objected to the proffered evidence on the ground that respondent was not entitled to attempt to establish that petitioner was guilty of a crime of which he had never been convicted.[3] (R. 524.) Respondent's counsel then explained that the purpose of

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[3]Selling wine at a price in excess of ceiling was a crime. Sec. 205(b), Emergency Price Control Act (50 App. U.S.C., Sec. 925(b)); *M. Kraus & Bros. v. United States,* 327 U.S. 614.

the evidence was to impeach petitioner (R. 524), and further stated that since petitioner had testified on cross-examination[4] that he had never sold at prices in excess of ceiling respondent was entitled to impeach him by contradicting that testimony. (R. 527-528.) Petitioner's counsel repeated and pressed his objection to any evidence tending to show petitioner guilty of a crime of which he had not been convicted, or even indicted or tried, since the evidence was offered only for impeachment and was not relevant to prove a necessary fact. (R. 527-528.) The Tax Court admitted the evidence over petitioner's objection and granted petitioner an exception. (R. 531-532.)

The evidence in question was testimony of a revenue agent and an accounting calculation which he testified he had prepared from the income tax returns and records of the taxpayer and from certain of the evidence in the case. After questioning the witness to be certain that the evidence did tend to establish that petitioner had sold wine at over-ceiling prices, the judge admitted the testimony and the accounting calculation as Respondent's Exhibit W. (R. 529-531.)

Exhibit W purports to establish that petitioner sold wine for an average price of 69½ cents a gallon during

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[4]Respondent's counsel was mistaken in this. On cross-examination he had asked petitioner what price he had received per gallon for certain wine sold in carload lots, and petitioner had testified that he did not remember how much he received per gallon for this wine. (R. 157, 169, 213-214.) Thus the calculation respondent persuaded the Tax Court to admit at this point was actually all that showed that price per gallon. Respondent's trial counsel must have recognized this, as appears from his argument to the Tax Court. (R. 527.)

the period when petitioner's ceiling on wine of his own manufacture was 28 cents a gallon. It is based on several hypotheses concerning the portion of his wine sales which were of sweet wine and of higher grade wine purchased from others to which this ceiling did not apply, and these hypotheses could have been established to be erroneous had the issues in the case warranted it. This demonstrates the wisdom of the rule the judge's ruling violated, which rule would have excluded evidence tending to establish guilt of a crime.

One thing respondent elaborately attempted to establish, in which attempt Exhibit W was the capstone, was that petitioner sold about 60,000 gallons of wine in carload lots to an Ohio winery, for a price of $51,800.95. The findings of the Tax Court reward these efforts with a finding to that effect, coupled with a finding that the ceiling price for the wine was about 27½ cents a gallon. (R. 61.)[5]

It is apparent, then, that respondent's counsel offered evidence tending to establish that petitioner had committed a crime, and that he defended the admissibility of the evidence against petitioner's objection on the ground that it would tend to impeach petitioner. Furthermore, the Court admitted the evidence and even made findings accepting it, thus showing the significance it had attained in the mind of the judge.

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[5]Petitioner did not testify what the ceiling was on this sale, nor what he thought it was. As already noted, he testified that he did not remember the per gallon price he received for it. He also testified that this was specially prepared wine sold at carload lot prices. (R. 140-141.)

The Tax Court erred in overruling the objection. It is bound to apply, not its own rules of evidence, but those in effect in the District of Columbia. I.R.C. Sec. 1111. The general proposition, that evidence tending to establish that a witness or party has committed a crime for which he has not been convicted is inadmissible even to impeach, is followed by the courts of the District of Columbia. *Campbell v. United States* (C.A. D.C., 1949), 176 F. 2d 45; *Thomas v. United States* (C.A. D.C., 1941), 121 F. 2d 905; *Clawans v. District of Columbia* (C.A. D.C., 1932), 62 F. 2d 383. Those courts apply the rule in civil and criminal cases alike. *Hockaday v. Red Line Inc.* (C.A. D.C., 1949), 174 F. 2d 154; *Campion v. Brooks Transp. Co.* (C.A. D.C., 1943), 135 F. 2d 652; *Sanford v. United States* (C.A. D.C., 1938), 98 F. 2d 325, 327; *Chebithes v. Price* (C.A. D.C., 1930), 37 F. 2d 1008.

The rule proscribing admission of evidence of unconvicted crimes is not peculiar to the District of Columbia. This Court and other federal appellate courts enforce it. *Mitrovich v. United States* (C.A. 9, 1926), 15 F. 2d 163; *Dawson v. United States* (C.A. 9, 1926), 10 F. 2d 106, cert. den. 271 U.S. 687; *Ingram v. United States* (C.A. 9, 1939), 106 F. 2d 683; *Simon v. United States* (C.A. 4, 1941), 123 F. 2d 80, cert. den. 314 U.S. 694; *Pullman Co. v. Hall* (C.A. 4, 1932), 55 F. 2d 139. The Supreme Court also has recognized the existence of the rule. (*Michelson v. United States* (1948), 335 U.S. 469.) The leading text accepts it and regards it as firmly established. III Wigmore on Evidence (3d Ed., 1940, & Supp.), Sec. 977 et seq., Sec. 1005.

The application of the rule to unconvicted violations of the Emergency Price Control Law seems clear enough, since there is no reason why such acts should be excepted from the general rule. Thus in *United States v. Klass* (C.A. 3, 1947), 166 F. 2d 373, the rule was applied to reverse a conviction for sales in violation of established ceilings. On cross-examination, the prosecutor obtained from the defendant a denial that he had made other sales at overceiling prices. He then offered evidence to disprove the defendant's denial and thus impeach him. The admission of this evidence was held to be reversible error, since impeachment by proof of unconvicted crimes is improper. The fact the unconvicted crime was similar to the one for which the defendant was being tried did not justify departure from the established rule. Accordingly, the fact the instant case involves the government's efforts to allocate a price in excess of ceiling to a sale by petitioner does not justify attempting to impeach him by trying to prove he had made earlier sales in excess of ceiling price.

As we have pointed out above,[6] respondent's counsel believed mistakenly that on cross-examination petitioner had been asked whether he had made earlier sales in excess of ceiling, and had denied it. Had the recollection of respondent's counsel been correct, the admission of the evidence objected to would nevertheless have been erroneous, as the cited cases hold. Moreover, had respondent's counsel asked the question and received the answer he thought he had, he would have been bound

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[6]Footnote 4, supra p. 13.

by petitioner's denial. *Smith v. United States* (C.A. 9, 1926), 10 F. 2d 787, 788; *United States v. Klass* (C.A. 3, 1947), 166 F. 2d 373; *Martin v. United States* (C.A. D.C., 1942), 127 F. 2d 865, 868, 870; *Simon v. United States* (C.A. 4, 1941), 123 F. 2d 80, cert. den. 314 U.S. 694; *Howser v. Pearson* (Dist. D. C., 1951), 95 F. Supp. 936 (civil); III *Wigmore on Evidence* (3d Ed., 1940 & Supp.), Secs. 1001-1003. He could not then have disproved it.

The error in the admission and consideration of this evidence cannot be brushed aside as harmless. In the first place, as has been noted previously, the judge thought it sufficiently important to include in his findings. (R. 61.) In the second place, something impeached petitioner so completely that his testimony was consistently rejected on critical points. Thus when the court thought the testimony of John Dumbra contradicted petitioner's,[7] he accepted Dumbra's testimony even though petitioner's testimony was corroborated by his daughter (R. 240-243), and even though Dumbra himself testified that he considered petitioner's word to be reliable, on the basis of his reputation. (R. 582.) He even found that petitioner had bought back 1,000 gallons of wine of his own vintage (R. 75, 79), notwithstanding that petitioner had clearly testified that the wine he had repurchased was high quality Italian Swiss Colony wine of a type he was accustomed to sell for $1.10 a gallon and more. (R. 200, 214-215, 216-217.)

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[7]Petitioner's version of English is quite difficult to understand. (R. 60.) Dumbra admitted he had trouble with it and, while he tried to understand, he was not always certain of what petitioner was saying. (R. 579-580.) The court, however, found that Dumbra understood petitioner (R. 65), although the closest to this finding that Dumbra's testimony comes is a statement that he tried to understand petitioner. (R. 584.)

Moreover, the Tax Court failed to find that in the 275,000 gallons of wine sold in December, 1943, were 6,000 gallons of lees (sediment) which could have been expected to and did increase to 20,000 gallons by May, 1944, when the last of the wine was withdrawn. Petitioner testified to this effect and also that this lees was only worth 4 to 6 cents a gallon, having value only for brandy-making purposes. (R. 201-204, 210.) No finding was made on the value of the lees either, although petitioner's testimony on this point was also uncontradicted. The refusal to accept this testimony on a point helpful to petitioner's case[8] emphasizes the importance of the error made in the admission of the objectionable evidence.

Since the Tax Court so consistently found petitioner's testimony incredible, it is obvious that *something* impeached petitioner quite thoroughly. Nothing affirmatively suggests that it was not Exhibit W and accompanying testimony, whereas the court's finding that petitioner sold 60,000 gallons of wine in carload lots at a price in excess of ceiling affirmatively suggests this evidence successfully impeached petitioner. The finding would not have been made had it been thought irrelevant and its only conceivable relevance was to impeach, the purpose for which it was offered.

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[8]Since petitioner sold 20,000 gallons of lees for 28 cents a gallon whereas he could only have obtained 4 or 6 cents a gallon by selling the lees separately, there was an advantage to him in the sale of the entire gallonage at the 28 cents ceiling which conflicts with the theory adopted by the Tax Court. Moreover, this much of the wine could not possibly have had a value of $1 a gallon, the value the Tax Court placed on it.

The decision below should therefore be reversed, because of the refusal of the Tax Court to comply with the governing rules of evidence.

II. THE WRITTEN CONTRACT WAS NOT A SHAM, AND THEREFORE THE TAX LIABILITY OF PETITIONER SHOULD BE DETERMINED ON THE BASIS OF ITS TERMS AND NOT ON THE BASIS OF PREVIOUS AND SUPERSEDED NEGOTIATIONS.

The Commissioner of Internal Revenue does not have unlimited power to substitute his conception of a proper contract for that written by the parties. The power that he has exists in him only to prevent tax avoidance. Where the parties are related or commonly controlled, the statutory terms of Section 45 provide him with limited power to ignore contracts; since petitioner was not related to the Dumbras and had no interest in their corporation, Section 45 has no application to this case.

The other areas, in which the Commissioner's power has been held to exist independently of express statutory authority, are closely related. They are the area of sham and the area of control. The former is exemplified by *Helvering v. Gregory* (C.A. 2, 1934), 69 F. 2d 809, aff'd *Gregory v. Helvering* (1935), 293 U.S. 454, and the latter by *Griffiths v. Commissioner* (1939), 308 U.S. 355, and *Commissioner v. Court Holding Co.* (1945), 324 U. S. 331. Indeed, the relationship of the two doctrines is so close that in all probability the latter one is merely a particular application of the former.

(a) The price allocation in the written contract was not a sham.

A sham contract is one which is unsupported by any conceivable facts. The contract in this case was to sell the bulk of petitioner's wine inventory for the ceiling price, and the winery for $273,000. Why should this contract be treated as a sham?

The Tax Court does not use the word "sham" in characterizing this contract. However, this language does appear (R. 77):

> "We conclude from a consideration of all the evidence here that the written contract of sale does not reflect the agreement of the parties and that the substance of the transaction between them was a sale of the wine and winery for $350,000 without any agreement on a selling price for each class of property. So concluding, it was proper for respondent to make an allocation to reflect the consideration paid for the wine and for the winery."

We take it that a "written contract of sale which does not reflect the agreement of the parties" is merely a longer and possibly more precise way of saying "sham contract."

The Tax Court therefore has held that a contract to sell wine at the ceiling price and the winery at a specified price was a sham, and that the real contract was to sell wine and winery together for an unallocated price of $350,000, thus leaving the Commissioner and the Tax Court free to fix an allocation more to their liking. We challenge the Tax Court's conclusion, and shall demonstrate that it is unsupported by either findings or evidence.

The findings and the evidence accepted by the Tax Court as credible taken together show the following facts. John Dumbra approached petitioner and offered to buy four carloads of his wine. (R. 64.) Petitioner rejected this offer because he could not make a profit on such a sale (R. 64), an answer which the Tax Court in a footnote to its opinion interpreted as meaning that petitioner "had in mind his cost of production of about 50 cents a gallon and a ceiling price of 28 cents a gallon." (R. 73.)[9] Petitioner then stated that "the only transaction he would consider would be one for the purchase of all of his wine and the winery," and next petitioner is found to have made an offer to sell wine and winery together for $350,000. (R. 64.) Dumbra did not accept this offer, and made a conditional counter-offer of $330,000, subject to the approval of his principal. (R. 64.)

Plainly, up to this point there were only preliminary negotiations by which neither party was bound, even assuming the federal rule requires that the California Statute of Frauds be ignored. Up to this point, there

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[9]This footnote, in conjunction with an express finding that "Petitioner's ceiling price for the wine was not discussed" (R. 64), demonstrates how completely petitioner's credibility was impeached by the evidence tending to establish his guilt of a crime. Petitioner testified that he assigned his low ceiling price as the reason why, if Dumbra was to get any wine, he would have to buy it all, lees and all (R. 106), and the finding just quoted rejects this testimony, notwithstanding that the quotation in the text concedes that petitioner had it in mind. He had it in mind, yet he cannot even be given credit for having been truthful when he testified that he said it! Yet John Dumbra testified that he understood petitioner to be referring to the ceiling price in their conversation about the price to which he was limited in selling his wine. (R. 581.) Thus there was no conflict in the testimony here, which makes the rejection of petitioner's testimony the more startling.

was not even an oral contract, since Dumbra's counter-offer was in law a rejection of petitioner's offer.

John Dumbra then phoned his brother, who was in New York, and obtained authorization to go up to $350,000 for wine and winery, if necessary. (R. 64-65.) John Dumbra then informed petitioner that he would pay petitioner's price (R. 65, 576), and petitioner informed Dumbra that he would meet him in San Francisco in his attorney's office to draw up the papers. (R. 576.) At that very time, petitioner informed Dumbra that the papers would fix one price for the wine and another for the winery, with the total price being $350,000 (R. 65, 577), and Dumbra expressed assent. (R. 65, 577-578.)

Up to this point there was not yet a contract. Had the parties intended their contract to be an oral one, it would have been invalid under California law because of the Statute of Frauds.[10] However, the findings of the Tax Court recognize that both petitioner and Dumbra then intended to sign a written contract which would state the binding terms (R. 65), and the testimony of both petitioner and John Dumbra make this intent entirely clear. (R. 106, 576, 577.) Pursuant to their intention, the two men met the next day in San Francisco in the office of petitioner's accountant, Mr. George E.

[10]Civil Code Sec. 1624 declares "invalid" an oral contract to sell real property, and Sec. 1624a declares "unenforceable" an oral contract to sell personal property of a value in excess of $500, until there is part performance. There was no part performance until a later day when a $5,000 deposit was paid, but on that same later day the written contract was signed.

Oefinger, C.P.A. (R. 65.)[11] There the accountant advised petitioner that the ceiling price on his wine was 28 cents a gallon and that he would be subject to penalties if he sold it for more than that price. (R. 65, 264-265.) 275,000 gallons of wine at 28 cents a gallon is $77,000 (R. 267), the price allocated to the wine in the written contract the parties signed later the same day. (R. 65-66.)

After the accountant had calculated the ceiling price of the wine, petitioner called an attorney by the name of Fred Foster and asked him to prepare the written agreement. The accountant so testified (R. 269), and the testimony of Mr. Foster confirms it. (R. 398.) Mr. Foster prepared the agreement in accordance with instructions given to him by petitioner in the presence of John Dumbra. (R. 398-399.)[12] This agreement (Exh. A-1, R. 45-46; R. 66) was signed that same day "by Particelli as Seller and John Dumbra as Buyer." (Stip., par. 1, R. 44.) The written agreement quite clearly states that the price the purchaser is paying for the wine is $77,000 and that for the winery is $273,000. The Tax Court made no effort to place a different construction on the instrument.[13]

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[11]As noted heretofore in the text, Dumbra testified that the arrangement was to meet in the office of petitioner's attorney (R. 576), whereas petitioner testified that it was in the office of his accountant that they were to meet so that the accountant could calculate the ceiling price. (R. 106.) The Tax Court found the meeting occurred in the accountant's office (R. 65), presumably because the accountant and the attorney both so testified. (R. 263, 398.)

[12]Mr. Foster testified that he had earlier advised petitioner that he thought this sale would be subject to the same price ceiling as an ordinary sale of wine. (R. 397.)

[13]In view of the stipulated facts summarized above, the following sentence in the opinion of the Tax Court is clearly error (R. 65): "Dumbra did not at any time agree to purchase the wine for $77,000

It was clearly the intention of the parties to integrate their agreement into the written contract. If the circumstances recited above could leave any doubt of this, John Dumbra's testimony on another point would remove it. He testified that the oral understanding he and petitioner had reached was dependent on verification of the gallonage in the tanks, which verification was made by checking certain reports immediately prior to his signing the written agreement of sale. (R. 585.) He was asked (R. 587):

> "If it was, as you put it, too far away from the gallonage that Mr. Particelli had represented to you, would you have signed this agreement?"

To which he answered (R. 588):

"No."

Thus we have here the familiar situation of an integrated contract. The Restatement (Restatement of the Law of Contracts, Vol. 1, Sec. 242, Comment) states the rule as follows:

> "Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express."

In some respects the Restatement has gone farther than some courts in permitting the use of parol evidence to interpret integrated contracts, since Section 242 allows

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and the winery for $273,000." This finding is not only contrary to the stipulated facts but is belied by the following finding of the Tax Court (R. 65-66): "Thereafter, on the same day, petitioner and Dumbra, acting for Tiara, executed an agreement reading in part as follows: (then follows the text of the agreement)." This error is specified above as Specification of Error No. 6.

parol evidence to *establish* an ambiguity, as well as to *explain* one. However, the rule quoted above, which clearly prohibits the use of previous negotiations to *alter* an integrated contract, finds no dissent in American law of contracts.

The United States Supreme Court had occasion to fix the federal rule on this point in a series of early procurement cases arising in the Court of Claims. The words of the Court in *Brawley v. United States* (1877), 96 U.S. 168, 173-174, state the law quite clearly and succinctly:

> "The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

To the same effect are *Parish v. United States* (1869), 8 Wall. (75 U.S.) 489, and *Clark v. United States* (1868), 131 U.S. lxxxv, App., 19 L. Ed. 915. To the same effect in private diversity of citizenship cases are *The Union Mutual Life Ins. Co. v. Mowry* (1878), 96 U.S. 544, and *Wadsworth v. Warren* (1871), 12 Wall. (79 U.S.) 307. More recent federal usage is consistent with and accepts the *Brawley* statement, supra, as is evident from *United States v. Bethlehem Steel Co.* (1907), 205 U.S. 105, 117;

Sarnia Steamship, Ltd. v. Continental Grain Co. (1941, C.A. 7), 125 F. 2d 362, 364; *M. W. Kellogg Co. v. Standard Steel Fabricating Co.* (1951, C.A. 10), 189 F. 2d 629, 630-631.

It is therefore evident that, as the *Brawley* case held, even where the interests of the United States are involved, a written contract supersedes the negotiations and where its terms are clear cannot be overridden or contradicted by them. The Restatement rule of integrated contracts, quoted above, is thus applicable here. The written contract, being perfectly clear, should control, and the preliminary negotiations, even if inconsistent with it,[14] cannot be substituted for the written contract.

The conduct of the parties after the signature of the contract establishes (1) their mutually consistent understanding of its terms and (2) their understanding that they were bound by its terms. It seems clear beyond dispute that the parties' conduct subsequent to the contract would be inconsistent with its terms if it were a sham.

The most revealing conduct was that of the purchaser, Tiara Products Co., for whom John Dumbra was acting. Its conduct was consistent with the terms of the written contract and can be explained only on the ground that Tiara considered that it was bound by the allocation of purchase price in the contract. About two weeks after

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[14]We do not concede that they are, since they contemplated the summation of a written contract in which there would be an allocation of purchase price between wine and winery. Dumbra was indifferent to the allocation but he testified that he was agreeable to it. (R. 577.)

the signature of the contract, Tiara sent its escrow instructions to the Bank of Sonoma County, the escrow agent. There were two instructions. One of these (Stip. par. 2, Exh. B-2; R. 44, 46-47; R. 67) instructed the Bank to pay $77,000 to petitioner on receipt from him of a bill of sale to the wine. (Exh. B-2, R. 46-47). A separate letter instructed the Bank to pay $268,000 to petitioner on the receipt from him and recordation of a bill of sale and grant deed to the winery, and the equipment in it. (Stip. Exh. D-4, R. 48-50.)[15] These two instructions were not mutually conditioned, so that the Bank would have had to pay petitioner $268,000 on recordation of the deed to the winery, even though the bill of sale to the wine was not tendered.

If the buyer had intended the contract to be a single sale for a lump sum of $350,000, any documents which the buyer had under its sole control would suggest that intent. The separate escrow instructions, exposing the buyer to the possibility of having paid $273,000 ($268,000 plus the $5,000 deposit) for the winery and equipment, without getting the wine, show quite clearly that the buyer did not consider the written contract and the price allocations in it to be shams.

It is pertinent in considering the significance of the buyer's escrow instructions to bear in mind that they were signed for the buyer by its attorney, A. M. Mull, Jr.[16] (R. 47, 48; R. 290, 298.) He testified that he under-

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[15]Exhibit D-4 replaced an earlier escrow instruction, Exh. C-3. (R. 47-48; Stip. par. 3, R. 44.)

[16]Mr. Mull is the same A. M. Mull, Jr. who was president of the State Bar of California in 1950. (R. 290.)

stood these escrow instructions to be consistent with his instructions from his client. (R. 298.) The only possible conclusion to be drawn from this evidence is that the buyer knew what it was doing and deliberately, not inadvertently, gave these escrow instructions which, as noted, cannot possibly be reconciled with the view that the buyer thought the written agreement was a sham.

The next evidence of the buyer's real intention is in the way the transaction was recorded on the buyer's records and in its income tax returns.[17] The parties to this case stipulated (R. 57) and the Tax Court found (R. 68) that the buyer entered the wine on its books "at a cost price of $77,000," and also used this figure as the cost of the wine in its 1943 and 1944 federal income and excess profits tax returns. Tax returns, it will be noted, are signed under the penalties of perjury.

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[17]The Tax Court waved aside this evidence as insignificant, citing *Doyle v. Mitchell Bros. Co.* (1918), 247 U.S. 179. This reference indicates how completely the Tax Court missed the point. In that case a corporation revalued its timber lands on December 31, 1908, and "the good faith and accuracy of this valuation (were) not in question, but the figures representing it never were entered in the corporate books" (247 U.S. at 181). After deciding the corporation was entitled to use the 1908 value in its tax returns, the Court said (247 U.S. at 187) that the failure to enter the value in the books was not controlling, "Such books are no more than evidential, being neither indispensable nor conclusive." If the corporation had entered in its books a figure inconsistent with that for which it contended, that "evidential" fact would have weighed heavily against it. The "evidential" fact here—and we do not contend it is more than "evidential"—is that the buyer had to make some entries in its books, it did so, and the entries accept the contract figures. These entries were made after the contract was fully executed, at a time when the buyer was entirely free to record its own concept of the transaction. The fact the recorded concept is consistent with petitioner's is thus a fact of great weight.

I.R.C. Sec. 3809(c). Moreover, the winery was entered on the buyer's books at a cost price of $273,000, and that figure was also used as its cost in the buyer's federal tax returns. (R. 57, 68.) The buyer used these figures because they were set forth in the written contract of sale. (R. 58, 68, 612-613, 613.) Victor Dumbra, the buyer's president, testified that the $77,000 wine cost was not a fictitious figure but was the real cost of the wine to the buyer. (R. 622.)

This evidence clearly shows that the buyer thought the allocation in the written contract of sale was real and binding on it. It recognized the real price of the wine as being $77,000. Its actions not only fail to establish a sham contract, but affirmatively establish that so far as the buyer was concerned the allocation in the written contract was not a sham.

Petitioner's conduct subsequent to the signature of the written contract also is consistent with the allocation in it. His escrow instructions were likewise contained in two letters (Stip. par. 4, Exhs. E-5 and F-6, R. 44, 50-51), and like Tiara's instructions his were not mutually conditioned. The Bank was instructed to deliver the bill of sale for the wine to Tiara on payment to the Bank of $77,000, and nothing was said about withholding the wine until the $268,000 to be paid for the winery was also received.

If, as the Tax Court held, the parties really intended a purchase and sale of the winery for $75,000 and of the wine for $275,000, both parties were strangely trustful

in their escrow instructions. Perhaps petitioner's trustfulness could be explained away on grounds of self-interest, if he was actually carrying out a grand deception, but Tiara's trustfulness cannot be so explained. It had nothing to gain by taking any chances. Its action can be explained only on the ground that it thought the prices in the written contract were binding.

The Tax Court gave no effect to the foregoing evidence but instead placed weight on facts found by it, to the effect that the revenue stamps placed on the deed were based on a valuation of $100,000, and the petitioner withdrew 1,000 gallons of wine and received a credit of $1,000. (R. 75-76; 67; 75.)

The Tax Court's finding about the revenue stamps is not objected to, but the inference it drew therefrom is indefensible. Section 3482, I.R.C. imposes a tax of 55 cents per $500 on sales of "lands * * * or other realty." It does not apply to sales of winery equipment that has not become affixed to the realty. Included in the winery which was sold for $273,000 was, as the buyer's escrow instructions state (Exh. D-4, R. 49), "all of the equipment and the personal property now contained therein, other than the stock of wine." This equipment included supplies, three wine pumps, two hydraulic presses and other production equipment (Exh. G-7, R. 52), plus redwood fermentation vats and redwood and oak storage barrels. (R. 509-510.) Government witness John Dumbra testified that this equipment and cooperage were all in sound shape (R. 575-576), and government witness Gom-

berg testified that in 1943 all such items were in short supply. (R. 496-497.) The storage barrels were particularly valuable to the buyer, as a place to store the wine it was buying. The Tax Court thus overlooked the fact that a substantial portion of the winery property which was sold for $273,000 was not subject to the stamp tax, and accordingly erred in believing that the fact that only $100,000 of value was stamp tax paid was an indication that the parties believed the winery was only worth $100,000.

The Tax Court also erred in attaching significance to the fact that petitioner withdrew 1,000 gallons of wine at $1 a gallon.[18] This was not young, unfinished wine of his own manufacture, such as nearly all the wine sold was, but was Italian Swiss Colony Burgundy, of the sort petitioner customarily had sold for prices ranging from $1.10 to $1.20 a gallon.

Government's Exhibit L states the background of this matter, and the relevant passage from the exhibit is quoted at page 133 of the printed record. It is as follows:

> "You will recall that 1,000 gallons were withdrawn by Mr. Particelli prior to the closing of the deal and that the whole deal amounted to 274,000 gallons, with an adjustment to be made by Particelli in connection with the 1,000 gallons."[19]

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[18]This point is Specification of Error No. 3, above.

[19]Petitioner's testimony was (R. 132):

> "* * * I reserved the right to take some wine when I sold the winery and wine to Mr. Dumbra. * * * I still have a few barrels.
>
> Q. How much wine was that?
>
> A. Around 1,000 gallons."

Prior to the sale, petitioner not only operated a winery but a small retail store at which he sold wine, and this store and attached bottling plant (R. 60, 157, 165) were not sold to Tiara. (Exh. A-1, R. 46; R. 204.) From this store he had sold several grades of wine, most of which, prior to the sale to Tiara, was wine purchased by him from other producers. (R. 61, 190-192, 194-197.) The best grade of this was wine purchased from Italian Swiss Colony, and of that petitioner retailed the dry wine at prices ranging from $1.10 a gallon (R. 194-195) to $1.20 a gallon. (R. 201.) Petitioner testified that the 1,000 gallons he withdrew was all high-grade wine of this sort, and he specifically identified it as Burgundy (R. 200) from Italian Swiss Colony such as he had in the past sold for $1.10 and $1.20 a gallon. (R. 214-215, 216, 217.) In fact, he testified that at the time of the hearing he still had one or two 50-gallon barrels of it in his basement. (R. 217; cf. R. 132.)

The Tax Court either overlooked or ignored this testimony and found that the 1,000 gallons withdrawn was wine of petitioner's own vintage on which the ceiling was 28 cents a gallon. The Tax Court erred in doing so. This testimony was certainly not inherently improbable; it was adhered to and even elaborated on cross-examination, and it was uncontradicated. It could not properly be rejected. *Grace Brothers, Inc. v. Commissioner* (C.A. 9, 1949), 173 F. 2d 170 at 174.

Perhaps the Tax Court was confused. Petitioner's testimony indicates that until the trial of this case he had never realized that he was charged $1 a gallon for

this wine which he withdrew. At R. 132 he testified that he bought it back for 28 cents a gallon, and at R. 134-135 he stated that if he was charged $1 a gallon for it then someone, either he or Mr. Mull, made a mistake. This testimony was referred to by the Tax Court, which concluded "our opinion is that the parties agreed that the credit was a fair estimation of the amount paid by Tiara for the wine." (R. 75.) Even if the Tax Court's quoted opinion were correct, it would be irrelevant since the wine withdrawn was not like the other 274,000 gallons but was high-grade Italian Swiss Colony Burgundy which petitioner had been selling for $1.10-$1.20 a gallon.[20]

Accordingly, there was no evidence *of any kind* tending to show that the written contract was a sham. The parties did not ignore its terms or act as if they were not bound by its terms. On the contrary, all the evidence is that the parties considered the prices set forth in the written contract controlling.

(b) The buyer's motives were not communicated to petitioner and could not bind him.

Considerable emphasis was placed by the Tax Court on evidence relating to Tiara's motives for purchasing the wine and winery on petitioner's terms, including its finding that Tiara did not want the winery but purchased it only to get the wines in it. (R. 65.) We submit that, since these motives were not shown to have been com-

[20]Prior to this sale to Tiara, petitioner had sold wine of his own vintage for 32-38 cents a gallon (R. 61, 98-99), which is equal to 21-27 cents a gallon in bulk before the alcohol taxes totalling 11 cents a gallon (R. 61) were paid. The bulk ceiling price of 28 cents a gallon was before tax. (R. 266.)

municated to petitioner, they do not have the slightest tendency to control petitioner's tax liability.

In this connection, it is notable that the Tax Court did not think it necessary to determine *petitioner's* motive. The Tax Court said (R. 76-77):

> "We need not determine petitioner's motive for having the written contract of sale specify a separate sales price for each class of property. The terms of the agreement in that regard were a matter of indifference to Tiara."

Yet the Tax Court in the preceding paragraph (R. 76) found light in Tiara's motives, and even gave weight to the fact that "Victor Dumbra testified that when considering the purchase from petitioner he made a mental calculation of the transaction and concluded that the winery might be worth $50,000 or $60,000."

We admit that the taxpayer's motives can be examined to ascertain if the transaction was entered into by him in good faith. *United States v. Cumberland Pub. Service Co.* (1950), 338 U.S. 451, 455. The motives of the other party to a contract, however, where not communicated to the taxpayer, can have no bearing on the *taxpayer's* purpose and good faith.

The evidence of Tiara's motive is almost entirely in the testimony of Victor Dumbra. Victor Dumbra did not meet petitioner or participate in the negotiations with him. He remained in New York while his brother John negotiated with petitioner in California, and before John accepted petitioner's terms he telephoned Victor for approval. (R. 574-575, 576, 592-593.) Victor's testimony

about his mental calculations and his reason for authorizing John to enter into the contract is irrelevant to petitioner's good faith, and falls far short of impeaching Tiara's good faith in entering into the written contract.

It must be recalled that in 1943 the wine business was a Wonderland which Alice probably would have recognized. The manner in which the price ceilings operated is described in detail in the testimony of the witness Gomberg. (R. 417, et seq.) In summary, it shows that OPA imposed no ceiling on grapes but placed ceilings on wine. There was a flat 28-cent ceiling on bulk red wine except for sellers who had made sales in bulk or bottles at prices above that figure prior to a basic date in 1942. Petitioner's ceiling on wine of his own vintage, as noted, was 28 cents a gallon plus tax, but Tiara had a bulk ceiling of $1.10 to $1.25 a gallon on red wine and about $2.00 a gallon net to it on bottled red wine. (R. 599-600, 620.) Since wine was in such demand that standards of quality were greatly relaxed, petitioner's wine had a much lower value to him than it had to Tiara.

It was in this context that Victor testified that he figured Tiara could afford to pay $1.00 to $1.10 a gallon for petitioner's wine. (R. 601.)[21] He also testified categorically that the price Tiara actually paid for the wine was that price stated in the contract (R. 610-611, 612, 613, 622) and that the $1.00 figure was only the value of the wine to Tiara, not to all others. (R. 613.) The obvious implication is that he had a sufficient cushion

[21]This discussion also relates to Specification of Error No. 5, above.

between the 28-cent contract price and the higher value of the wine to Tiara so that he need not concern himself with whether he made a bad bargain for the winery. This patently does not mean that any contracted prices were fictitious, and he specifically denied that they were fictitious. (R. 622.) Since he was the Commissioner's witness, the Commissioner is bound by his testimony—that which harms the Commissioner's case as much as that which helps it.

Accordingly, Tiara's motives are not entitled to consideration because they were not communicated to petitioner, and even if considered they fail to have the effect the Tax Court gave them.

(c) Neither the Commissioner nor the Tax Court has authority to rewrite the contract, since it was not a sham.

The Tax Court cited four cases,[22] three of which were its own decisions, as authority for its conclusion that the Commissioner has power to rewrite the contract. We fail to grasp the import of the last two on this case, but the point for which the first two are cited is quite revealing. The first of them is a non-tax case between private litigants, in which parol evidence was held admissible to show that a contract was without consideration, notwithstanding the recital of consideration in it. In the opinion, at the page cited in the footnote, the Court of Appeals said:

> "* * * the recitals of a written instrument as to the consideration received are not conclusive, and

[22] *Deutcher et al. v. Marlboro Shirt Co., Inc.* (1936, C.A. 4), 81 F. 2d 139, 142; *Haverty Realty & Inv. Co.*, 3 T.C. 161; *Nathan Blum*, 5 T.C. 702; *C. D. Johnson Lumber Corp.*, 12 T.C. 348.

> it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was."

Cases cited by the Court of Appeals for this proposition include *Cabrera et al. v. American Colonial Bank* (1909), 214 U.S. 224, and *Hitz v. National Metropolitan Bank* (1884), 111 U.S. 722. These two cases permit a party to a written contract to introduce parol evidence to show that the real consideration differed from that recited in the contract.

In the first of its own decisions cited in the opinion herein,[23] the Tax Court held that parol evidence was properly received by it because (1) the parol evidence rule has no application to third parties, which the Commissioner was, and because (2) parol evidence is always admissible, here quoting the sentence from the *Marlboro Shirt* case which we have set out above, to inquire into the validity of the consideration for a contract.

The Tax Court in the case at bar has evidently not distinguished between the admissibility of parol evidence and its effect. We never challenged the admissibility of parol evidence, even below, but we have never admitted that the evidence produced tended to override the consideration fixed by the parties in their contract.

The distinction the Tax Court seems not to have appreciated is clearly made in the Restatement of the Law of Contracts. Section 238(b) states that parol evidence is admissible even in the case of an integrated contract,

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[23] *Haverty Realty & Inv. Co.*, 3 T.C. 161, 167.

such as we have here, to show "illegality, fraud, duress, mistake or insufficiency of consideration." The Restatement accepts the basic proposition that a contract is not enforceable unless supported by consideration (Sec. 19(c)) and then provides (Sec. 81):

> "Except as this rule is qualified by Sections 76, 78-80,[24] gain or advantage to the promisor or loss or disadvantage to the promisee, or the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration."

The illustrations given state even more clearly than the principal statement that what is meant is that the victim of a bad bargain cannot plead insufficiency of consideration.

The findings clearly establish that as events turned out Tiara made a bad bargain in the price it paid for the winery. But Tiara could not have avoided the terms of the contract for that reason. Neither could it have voided the sale because, as events turned out, Tiara did not make such a good bargain as it thought for the wine.[25]

It follows, therefore, that the authorities discussed do not, contrary to the apparent view of the Tax Court, authorize either it or the Commissioner to rewrite a contract which the parties could not have avoided.

The Tax Court also cited *Commissioner v. Court Holding Co.* (1945), 324 U.S. 331, and *U.S. v. Cumberland*

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[24]These exceptions are not in point. Most of them deal with promises as consideration.

[25]Tiara bought the wine in the belief it was not bound by petitioner's 28-cent ceiling. To its sorrow, it found that it was, in respect of about half of the wine involved. (R. 69, 617-618.)

Service Co. (1950), 338 U.S. 451, for the Commissioner's and its authority to rewrite the contract. (R. 71.) We submit that they confer no such authority.

In the first place, we dispute the validity of the Tax Court's apparent view (R. 71) that the only difference between the two cited cases is in the ultimate fact found by the trial court. The Supreme Court did not mean that in that area of law the trial courts are free to decide like cases differently. *St. Louis Union Tr. Co. v. Finnegan* (C.A. 8, 1952), 197 F. 2d 565, 568. See *Twin Oaks Co. v. Commissioner* (1950, C.A. 9), 183 F. 2d 385, where this Court reversed the Tax Court in a related field, and *Goold v. Commissioner* (1950, C.A. 9), 182 F. 2d 573, where it reversed the Tax Court on the question of intent. An even more recent expression of this Court's views of its power of review of the Tax Court is in *Hatch's Estate v. Commissioner* (1952, C.A. 9), 198 F. 2d 26, where this Court reversed the Tax Court for its failure to follow the plain terms of a written contract.

There are vital factual differences between the *Court Holding* and *Cumberland* cases. In *Court Holding,* a corporation had orally committed itself to sell its property on certain terms, and then arranged the written contract to have its shareholders make the sale. Whereas in *Cumberland,* the parties who negotiated the sale were found to have conducted the negotiations at all stages for themselves as shareholders, not for the corporation. This finding is the one the Supreme Court meant to refer to as distinguishing the two cases, not the ultimate finding of liability.

In the second place, if petitioner had controlled Tiara or the Dumbras, the cited cases would be closely in point. The right to scrutinize closely transactions whereby shareholders cause their corporation to act has been long recognized, because one controls the other. It does not follow that a sale between unrelated parties, not subject to common control, where both are free to refuse to contract, is subject to similar skeptical review.

In the third place, the *Cumberland* case is controlling here, in favor of petitioner. In *Cumberland,* there was no arm's length bargaining between the contracting parties on the subject of whether the sale was to be by the corporation or its shareholders. The shareholders laid down the condition that the sale would be made by them, and the buyer, not being interested in who made the sale so long as someone did, acquiesced in the shareholders' terms. This circumstance was not enough to permit the Commissioner to disregard what the parties actually contracted in the *Cumberland* case, so it was error for the Tax Court to hold that the fact that Tiara did not care whether petitioner sold wine for the ceiling price justified the Commissioner in disregarding a contract in which the parties said they bought and sold wine for that figure.

The quotations from the Supreme Court opinion in the *Cumberland* case which appear in the Tax Court's opinion below (R. 71-72) merely mean that the "motives, intent, and conduct" can be looked to to determine if the papers are a sham. If they are not sham, the Commissioner is bound by what the parties have created.

Since this is true where the circumstances are entirely within the control of the tax-paying interests, as in the *Cumberland* case and the *Twin Oaks* decision of this Court (183 F. 2d 385), it is *a fortiori* true here.

Since the conduct of the parties, and particularly significantly that of the buyer, does not show they considered the price allocation to be a sham, Commissioner and Tax Court are bound by its terms.

Interestingly enough, there are other recent cases in which the Tax Court has shown that it understands that the law is as we outline it. In *Wood Process Co.,* 2 T.C. 810, and *McCulley Ashlock,* 18 T.C. 405, it held that the tax effect of a contract depends on its terms, not on the circumstances motivating its execution. And in *Estate of Jacob Resler,* 17 T.C. 1085, acq. 1952-1 C.B. 3, the circumstances were essentially analogous to those herein, but the Tax Court held the final result was controlling, not the negotiations leading up to it.

We are at a loss to explain the aberration here. This is not a tax avoidance case. The evidence previously discussed clearly shows that petitioner acted on advice that the sale must be at ceiling price and insisted that the ceiling price be allocated to the wine in order to comply with regulations of the OPA as he understood them. The Tax Court did not make a finding as to petitioner's motive (R. 76-77); it pointed out that regardless of what advice the evidence shows that petitioner received, there was no ceiling applicable to this sale. It then observed (R. 77): "Had the respondent accepted petitioner's representation of sale, the result would have been a saving of tax to petitioner."

Perhaps the Tax Court meant, in the passages just referred to, to imply that it thought petitioner was motivated by tax avoidance motives. If its decision is meant to be distinguished from its other decisions referred to by the supposed presence here of such a motive, the decision is wrong. *U. S. v. Cumberland Public Service Co.* (1950), 338 U.S. 451 at 455, specifically states that the presence of tax avoidance motives will not alone support a tax assessment. In *Twin Oaks Co. v. Commissioner* (C.A. 9, 1950), 183 F. 2d 385, and *Hypotheek Land Co. v. Commissioner* (C.A. 9, 1953), 200 F. 2d 390, this Court quite recently has reversed the Tax Court for overlooking the fact that it cannot impose a tax merely because the taxpayer may have arranged his business affairs as he did in order to avoid the tax.[26]

III. THE TAX COURT MADE FINDINGS WHICH ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THIS COURT IS NOT BOUND BY THEM.

Specifications of Error numbers 3, 4, 5, and 6 challenge certain specific findings of the Tax Court. Each of them has been discussed above. No. 3 is discussed at pp. 31-33, No. 4 at p. 17, No. 5 at pp. 35-36, and No. 6 at pp. 23-24. To repeat the discussions would unduly lengthen this brief so we shall not do so.

The power of the Court to consider these specific objections as well as those more general objections argued

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[26]And cf. *Goold v. Commissioner* (1950, C.A. 9), 182 F. 2d 573, where this Court rejected the Tax Court's finding respecting intent and itself found that there was no motive to escape taxes. It also held such motive, if present, was irrelevant. 182 F. 2d at 575.

in the preceding division of this brief is sustained by *Grace Bros., Inc. v. Commissioner* (C.A. 9, 1950), 173 F. 2d 170, where the Court thoroughly discusses its power of review of Tax Court findings.[27] We have not challenged here the findings in which the Tax Court settled a conflict in the evidence, nor in which it drew an inference which the evidence could be interpreted to permit.

Specification No. 3 is based on the Tax Court's ignoring clear, uncontradicted testimony by petitioner which is not improbable in character. Nos. 4 and 5 are based on the Tax Court's apparent failure to read the portion of the testimony of witnesses whom the Tax Court credited in which their testimony is squarely contrary to the findings supposed to be based on it. Error No. 6 is so apparent that we are inclined to believe it found its way into the formal findings by mistake. Each challenged finding is insupportable and is not binding on this Court.

IV. THE FAIR MARKET VALUE OF THE WINE COULD NOT EXCEED ITS CEILING PRICE, AND IT WAS ERROR FOR THE TAX COURT TO ASSIGN A HIGHER SELLING PRICE TO IT.

(a) The Tax Court has found that in the months immediately prior to December, 1943, petitioner sold wine of the same type and quality as that involved in

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[27]Cases reversing the Tax Court in cognate fields are *Goold v. Commissioner* (1950, C.A. 9), 182 F. 2d 573; *Twin Oaks Co. v. Commissioner* (1950, C.A. 9), 183 F. 2d 385; *Hatch's Estate v. Commissioner* (1952, C.A. 9), 198 F. 2d 26; *Hypotheek Land Co. v. Commissioner* (1953, C.A. 9), 200 F. 2d 390, and *Benton v. Commissioner* (1952, C.A. 5), 197 F. 2d 745. In the latter case, the Tax Court was reversed for departing from the terms of a written contract in favor of its own ideas of what the contract should have been.

the Tiara sale, and he sold it at prices ranging between 32 and 38 cents a gallon, depending on volume. This price included the 11 cents of state and federal wine taxes, so the net prices to him were 21-27 cents a gallon. (R. 61.) At this time his ceiling before taxes was 27½ cents a gallon. (R. 61.) Yet the Tax Court has also found that this same sort of wine had a market value of $1.00 a gallon when it was sold to Tiara in December, 1943. (R. 79.) We believe that we can demonstrate that this latter finding is clearly erroneous, thus constituting error which this Court can correct (*Grace Bros., Inc. v. Commissioner* (1949, C.A. 9), 173 F. 2d 170, 173).

In addition to the evidence and findings about prices petitioner had received in earlier sales of wine of his own production, the record contains similar evidence from government witness Mondavi. His winery (Charles Krug) produced quality wines and also the so-called competitive or lower grade wines. (R. 333-335.) It produced a quality Zinfandel, aged four years or more before being marketed, which it sold for $6.00 a case of 2.4 gallons, net to the winery. (R. 334.) This is a price, net to the winery, of $2.50 a gallon. Petitioner's vintage which sold for 21-27 cents a gallon net to him, and which was sold to Tiara, was also Zinfandel, but it was neither aged nor finished. (R. 615.) Mondavi's winery likewise sold a wine comparable to that of petitioner, except that it was finished (R. 335-336), and prior to October, 1943 that wine was sold by Mondavi's winery for 35 cents a gallon. (R. 337.)

In October, 1943, Mondavi began selling his competitive wine by what he called the "contract bottling arrange-

ment." (R. 336, 337.) As described by the Tax Court, this method "consisted of shipping the wine to a bottler to be bottled for the account of the winery, and then selling the bottled wine to the bottler." (R. 63.) In Mondavi's own words (R. 317), this method was used to "circumvent" the ceilings applicable to bulk sales. Mondavi testified that by resort to this circumvention, a vintner could obtain 75 cents to $1.00 a gallon for competitive grade wine, and therefore he valued such wine at 75 cents to $1.00 a gallon. (R. 315-317.) Government witness Gomberg testified to a value of $1.00 a gallon for such wine (R. 458), and he too placed his opinion squarely on prices obtained by this method, which he called the franchise bottling method. (R. 460.)[28]

Fair market value cannot be based on sales under conditions not representive of normal market conditions. Prices produced by pronounced speculative pressures are not evidence of fair market value. (*Tex-Penn Oil Co. v. Commissioner* (C.A. 3, 1936), 83 F. 2d 518, aff'd 300 U.S. 481; *Strong v. Rogers* (C.A. 3, 1934), 72 F. 2d 455, cert. den. 293 U.S. 621.) Sales must be on a normal and open market to establish a fair market value (*Wood v. U.S.* (Ct. Cl., 1939), 29 F. Supp. 853; *Hazeltine Corp. v. Commissioner* (C.A. 3, 1939), 89 F. 2d 513), and legally en-

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[28]His testimony was (R. 460-461):

"Q. What is your opinion based upon, your opinion wine was worth a dollar a gallon in 1943?

* * * * * * *

A. I would say primarily upon franchise bottling.

Q. Is it based upon the bulk sale of the wine and winery at all?

* * * * * * *

A. No, it is based upon the amount of money that the winery could get for the wine in the form of bottled goods."

forceable restrictions operate as a ceiling to value for tax purposes (*Helvering v. Salvage,* (1936) 297 U.S. 106, 109). Sales based on a device for circumventing the price ceilings cannot establish an open and free market, at least unless the device is generally known and open to all to use.

The evidence here is quite clear that this device was not generally known in December, 1943. Although Mondavi testified he began using it in October, 1943, he also testified that it was not until early 1944 that his firm received a ruling from OPA that it would not object to the use of this method. (R. 349.) Thus it was not until after the transaction herein involved was concluded that Mondavi knew whether or not his firm would be subjected to penalties for selling under the contract bottling method at prices above the bulk ceiling price. Plainly, we submit, Mondavi's testimony fails to establish that when this sale was made the contract bottling method had created an open market for wine at overceiling prices.

The government witness Gomberg, who also based his opinion upon sales made in this manner, testified that while he knew of an oral ruling made by someone in OPA in late 1943 approving contract bottling (R. 495), he did not know of any written ruling to that effect. (R. 496.) Since oral rulings by government officials have no binding effect, no careful seller would have regarded Mr. Gomberg's information as establishing an open and free market for wine at prices above the bulk ceiling. Mr. Gomberg, who was affiliated with the Wine Institute,

did not inform petitioner of this oral ruling; in fact, he did not recall ever having met or talked to petitioner, although he thought possibly he had done so in 1941 or 1942. (R. 488.) There was no information about the contract bottling method in the Wine Institute bulletins to the wine industry until late 1944 or early 1945. (R. 452-453.)

Accordingly, Gomberg's testimony, like that of Mondavi, shows there was not, in December, 1943, such general knowledge and confidence in the safety of the contract bottling method as to establish an open and free market for wine at prices above the bulk ceilings.

If petitioner had known of the contract bottling circumvention, perhaps the foregoing discussion would have less point. There is not, however, any evidence that either he or Dumbra knew of it. There is the evidence that petitioner did not. Both petitioner's lawyer and his accountant testified that they advised him he must sell his wine at the ordinary bulk ceiling.

Furthermore, the fundamental premise of the Tax Court decision is that Tiara bought the winery because it was the only way petitioner could be paid a price he would accept.[29] The Tax Court also has found, based on Dumbra's testimony, that petitioner told Dumbra he wanted to get out of the business and *that* was why he would only sell winery and wine together (R. 64, 73), and has treated that statement which it finds petitioner did make in 1943, as

[29]In three different places the Tax Court finds or states that Tiara bought the winery only because it had to to get the wine. (R. 65, 68, 76.)

being only a guise,[30] designed to obscure the fact that petitioner wanted to sell the winery because in no other way could he obtain a price for the wine which he was willing to accept.

This premise and theory are at odds with any inference that either petitioner or Dumbra knew of the contract bottling method. If Dumbra knew of it, and did not want the winery, it represented a much better way of getting the wine. Had he known of it, can it be supposed he would have failed to inform petitioner of it? Clearly not. Had petitioner known of it, can it be supposed he would have sold the winery? Clearly not, unless petitioner really wanted to get out of the business.

If petitioner had sold under the contract bottling method, he could have received 75 cents or more per gallon of wine, on Mondavi's testimony, which would have been a profit of 25 cents or more a gallon over his cost. Moreover, as an added inducement, he would still have kept his winery to make more wine to sell at a profit under the contract bottling method next year. His sale of the winery, if he knew of the contract bottling method, was against his own best interests. The only possible inference is that neither petitioner nor Dumbra knew of that method.

Since petitioner and Dumbra were not aware of the contract bottling method, they cannot properly be held to have contracted on the basis of a market value based entirely on it. The Tax Court erred in finding a value for the wine on such a basis, and unless the wine had such a value peti-

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[30]And this notwithstanding the fact that petitioner never reentered the wine business.

tioner cannot be treated as having sold it for $1.00 a gallon.

(b) We do not accept the view that the Government can have one rule for determining its liabilities and one more favorable to it for determining its rights. The Tax Court had no difficulty rationalizing that double standard, but since its jurisdiction causes it to concern itself only with the Government's rights and never with the Government's liabilities, perhaps it is less concerned with such consistency than courts of broader jurisdiction.

If the United States had requisitioned petitioner's wine in December, 1943, the United States would have paid him only 28 cents a gallon for it, and if he had sued to get more he would have lost. *United States v. Commodities Trading Corp.* (1950), 339 U.S. 121; *United States v. John J. Felin & Co.* (1948), 334 U.S. 624. If the United States had taken the winery as well as the wine, these cases make it clear that petitioner would still have received only 28 cents a gallon for his wine. In these circumstances, there is something unpalatable about the spectacle of the United States contending that for tax purposes a contract selling the wine for 28 cents a gallon is so unreasonable that it must be upset, because for tax purposes the wine had a value in excess of 28 cents a gallon.

It is quite clear that if petitioner had pointed to contract bottling methods and sales of wine-cum-winery as justification for his claim that he should receive more than ceiling price for requisitioned wine, he would have been unsuccessful in getting more than 28 cents a gallon. Sim-

ilar arguments were advanced and proved unavailing in the Supreme Court cases cited above.

The equities in favor of the citizen gave the Supreme Court trouble. In the *Felin* case (1948, 334 U.S. 624), the requisitioned goods had cost the citizen more than the ceiling price, and for this reason he had refused to make any more sales to the Government. The Government thereupon requisitioned the goods and tendered the ceiling price. The Court of Claims held in the citizen's favor, but the Supreme Court[31] reversed, requiring three separate opinions by as many justices to state the reasons for the reversal.

The next case gave the Supreme Court an opportunity to clarify its position, and it did so. This case, the *Commodities Trading* case (1950, 339 U.S. 121), found Mr. Justice Frankfurter, author of one of the prevailing opinions in the *Felin* case, in dissent. Here the equities in favor of the citizen were even stronger than in the *Felin* case.

In the *Commodities Trading* case, the War Department had requisitioned 760,000 pounds of whole black pepper and wanted to pay Commodities the OPA ceiling price of 6.63 cents per pound. Commodities claimed that it was entitled to receive 22 cents per pound and instituted suit in the Court of Claims for that figure. The Court of Claims fixed just compensation at 15 cents per pound, this representing an amount more than double the OPA ceiling price.

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[31] After argument, and reargument at the next term, by Acting Solicitor General (now Circuit Judge) Washington. Plainly the case was thought important by the Government.

The Court of Claims rested its decision upon what it termed the "retention value" of the commodity. According to the Supreme Court, the Court of Claims "also considered how much the precise pepper requisitioned cost Commodities, the prices at which that company sold pepper after the government requisition, subsequent OPA ceiling prices, and the average price of pepper for the past 75 years." (339 U.S. 121, at 123.) The Supreme Court reversed, and held that the ceiling price for black pepper was the just compensation to which Commodities was entitled under the Constitution when its property was requisitioned by the Government. The Court stated (339 U.S. at 123) that the question before it was whether the fair market value test which was normally applied in case of a free market was applicable where there was not a free market because of government price controls. After some discussion, the Court stated (339 U.S. at 124):

> "Thus ceiling prices of commodities held for sale represented not only *market value* but in fact the only value that could be realized by *most* owners. Under these circumstances they cannot properly be ignored in deciding what is just compensation." (Emphasis added.)

After further discussion, the Court also said (339 U.S. at 128):

> "But the ceiling price of pepper, fair and just to the trade generally, should be accepted as the maximum measure of compensation unless Commodities has sustained the burden of proving special conditions and hardships peculiarly applicable to it."

Thereafter the Court rejected Commodities' contention that the retention value to the pepper for which Commodities contended was a special circumstance which would avoid the application to it of the general rule. Then the Court passed to the next contention (339 U.S. at 129):

> "Another contention is that the particular pepper turned over to the Government cost Commodities more than the ceiling price, and that this is a special circumstance sufficient to preclude use of the ceiling price here. The Court of Claims did find that the average cost to Commodities of the precise pepper taken, including labor costs, storage, interest, insurance, taxes and other expenses, was 12.7 cents per pound. * * * (The Government challenged these findings on various grounds.) * * * We do not consider these contentions of the Government because we think that the cost of the pepper delivered provides no sufficient basis for specially excluding Commodities from application of the ceiling price. *The general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price.* (Citation omitted.) The reasons underlying the rule in cases where no Government-controlled prices are involved also support its application *where value is measured by a ceiling price.*" (Emphasis added.)

We submit that it is apparent that arguments that sharp practices were available whereby overceiling prices might be obtained would have failed to move the Supreme Court from its view that ceiling prices establish fair market value. It is also significant that, as will appear from the foregoing quotations, the Supreme Court accepted as a

premise and even reaffirmed its earlier decisions that market value, where ascertainable, is the measure of just compensation.[32]

The Tax Court's stated reason for not applying these cases here is not enlightening. It is (R. 78) "There is no factual basis here for the application of the cases." If the Tax Court meant to refer back to its earlier statement (R. 77) that there was no ceiling price on the sale because it was part of the sale of a business, its distinction of the *Felin* and *Commodities Trading* cases is unsound, for two separate reasons. First, there was no OPA ceiling price applicable to the transactions involved in those cases either. Because the Constitution fixed the price of requisitioned property at "just compensation," which means "market value," no OPA regulation could directly apply to it. Second, the Tax Court is wrong in its belief that this sale was exempt from the ceiling on wine. It is to be noted that OPA did not so rule. It gave no ruling at all on petitioner's sale. The Tax Court's belief is based on its own interpretation of an OPA ruling in 1942, as interpreted in the stipulated opinion of a former OPA attorney (Stipulation of testimony of Frank Sloss; not printed), and a letter ruling dated April 6, 1944 from an OPA price attorney about another sale. (Exh. V; not printed.)[33] Both the letter and the stipulated testimony emphasize that the

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[32]*United States v. Causby* (1946), 328 U.S. 256; *United States v. Miller* (1943), 317 U.S. 369. "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken * * *. Market value fairly determined is the normal measure of the recovery." *United States v. Causby,* 328 U.S. at p. 261.

[33]Sloss: "I have been asked for my opinion on the question whether any maximum price was applicable to a sale of a quantity of wine in bulk * * * where the sale was a part of and in connection

sale, to be exempt, must be one of an entire business, including all its assets. The Tax Court's interpretation of the ruling as applicable here is wrong, because the bottling plant and store where the retail end of the business was conducted were specifically excepted from the sale. (R. 46.) Petitioner could have had no assurance of freedom from prosecution or penalty if he had known about this ruling and had sought to rely on it.

In any event, the market value as established by ceiling prices cannot be so lightly waved aside. If possibilities of obtaining overceiling prices are irrelevant in determining market value where the Government's obligations are involved, so should they be when its rights are involved.

There is a recent indication that the decision below may not represent the views of the entire Tax Court.[34] More recently, in *L. E. Shunk Latex Products, Inc.* (1952), 18 T.C. No. 121, the Tax Court held that it could not approve a reallocation of income under Section 45 where the effect

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with the sale of a winery as a going business * * *. In my opinion such a sale was not subject to any maximum price.

* * * * * * *

"The foregoing opinion is limited to the situation in which an inventory of wine is sold as a part of the sale of the winery as a going business. It does not apply to the sale of a quantity of wine in bulk apart from the sale of a going business."

Letter ruling: "We advise that the sale of a going business is excluded from price control. In such case, however, there must be a sale not only of, for example, the wine, but also of the equipment, physical assets, and good will. If the sale is made of the wine as a separate item, then there are price regulations which do apply to such sale."

[34]This decision below was not reviewed by the full Tax Court and is only a memorandum decision. The Tax Court attaches no precedential effect to a memorandum decision. *Lucille McGah* (1952), 17 T.C. 1458, 1459, on remand from *McGah v. Com'r* (C.A. 9, 1952), 193 F. 2d 662.

would be to allocate more income to one corporation than it could have realized under the ceiling prices established by OPA. It specifically stated that but for the ceilings it would have approved the reallocation.

We submit that the more recent view of the Tax Court is the correct one. It cannot reallocate income on a basis which rejects the controlling effect of ceiling prices.

CONCLUSION.

Error committed at the trial requires a reversal and remand. However, even on the record made below there is no legal foundation for the ultimate decision below, so that it should be reversed with instructions to find for petitioner on the disputed tax issue.

Dated, San Francisco, California,
February 24, 1953.

Respectfully submitted,
VALENTINE BROOKES,
ARTHUR H. KENT,
Attorneys for Petitioners.

No. 13,503

IN THE

United States Court of Appeals

For the Ninth Circuit

GIULIO PARTICELLI,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ESTATE OF ELETTA PARTICELLI, Deceased,
Arthur Guerrazzi, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Review of The Tax Court of the United States.

SUPPLEMENTAL BRIEF OF PETITIONERS.

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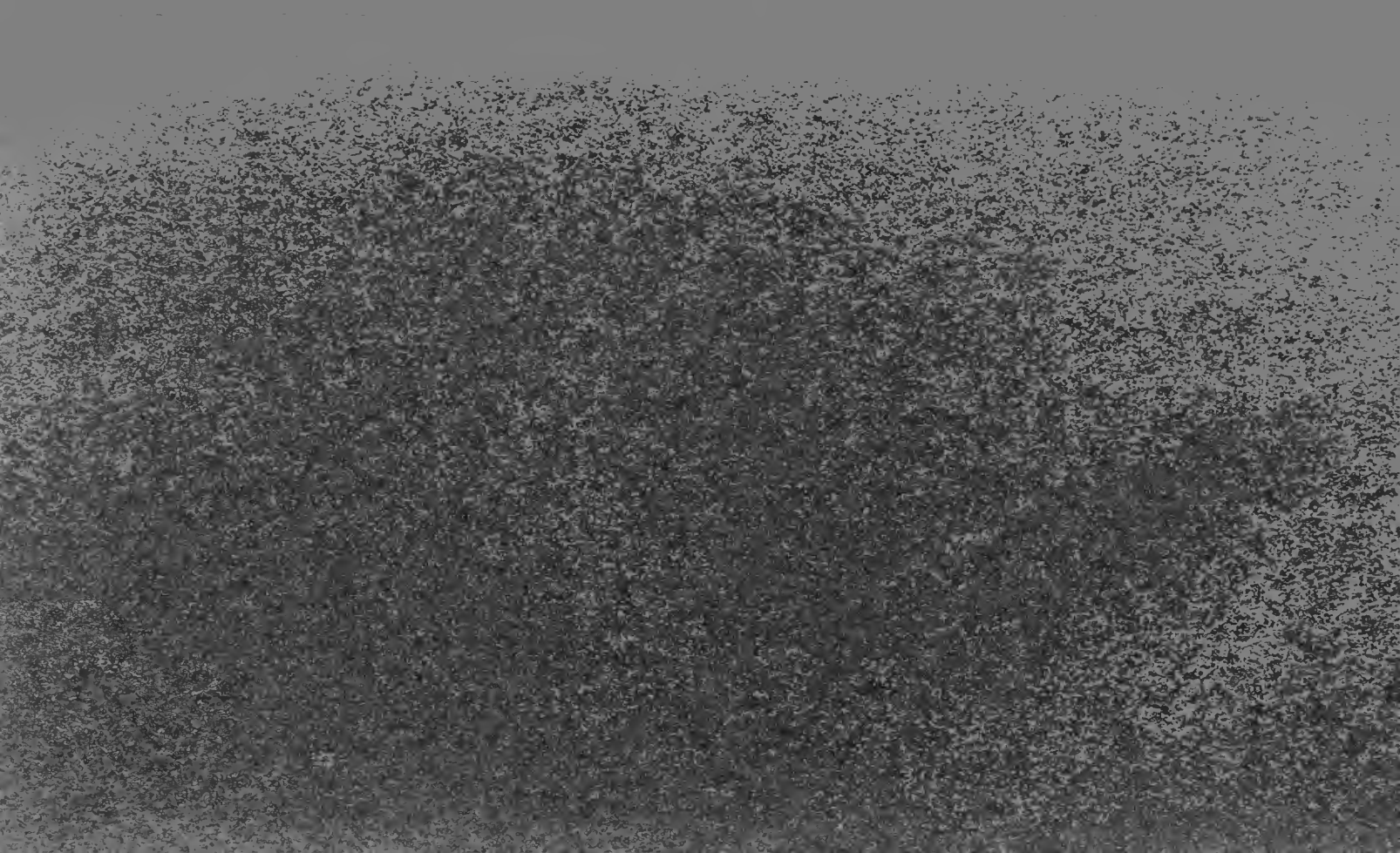

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On Review of The Tax Court of the United States.

SUPPLEMENTAL BRIEF OF PETITIONERS.

INTRODUCTORY.

This case is set for argument on April 7, 1954, and the final brief was filed on April 17, 1953. In the interim, several court decisions have been rendered which bear directly on the issues and should be called to the attention of the Court. This supplemental brief is offered for that purpose.

We shall discuss these intervening decisions in the order of their significance on the issues herein, not necessarily in the order in which the points involved were discussed in the earlier briefs.

I. TAX CONSEQUENCES OF CONTRACTS ARE TO BE DECIDED ON THE BASIS OF THE TERMS OF THE CONTRACTS, NOT ON THE BASIS OF THE CIRCUMSTANCES LEADING UP TO THE CONTRACTS.

The decisions in *Hamlin Trust v. Commissioner,* (CA 10, Feb. 1, 1954) 54-1 USTC 9215, not yet officially reported, affirming 19 T.C. 718, and *Commissioner v. Gazette Tel. Co.,* (CA 10, Jan. 30, 1954) 54-1 USTC 9214, not yet officially reported, affirming 19 T.C. 692, are essentially in conflict with decision below herein, yet in them the Tax Court took, and the appellate court affirmed, a position contrary to the position the Tax Court took herein. Perhaps this inconsistency is explained by the fact that the *Hamlin Trust* and the *Gazette* cases were reviewed by the full Tax Court, whereas the instant case was not.

The facts in the *Hamlin Trust* and the *Gazette* cases are fully set forth in 19 T.C. 718, and are summarized in the opinions of the appellate court. They show that, just as in the instant case, an offer was made and informally accepted for the purchase and sale of property for a lump sum price. It was understood that for that price the sellers were to transfer title to stock and give a covenant not to compete. When the parties met to draw up a formal contract, the sellers presented

a draft contract providing for a lump sum consideration. The purchasers asked that the draft be changed to allocate $150 per share to the stock and $50 per share to the covenant not to compete, for the purposes of making the covenant enforceable and of helping them taxwise. The sellers thought the allocation made no difference to them so they agreed to it with little discussion.

The Tax Court refused to permit either the Commissioner or the sellers to disregard the allocation in the contract. In the *Hamlin Trust* case, where the sellers were seeking to do this, the three dissenters in the Tax Court said (19 T.C. at 726):

> "Recitals of a written instrument as to the consideration are not conclusive and it is always competent to show by parol or other extrinsic evidence what the real consideration was. *Haverty Realty & Investment Co.,* 3 T.C. 161. Tax consequences from the sale of property depend upon the substance and actuality of the transaction rather than the form or recited consideration in the contract. *Commissioner v. Court Holding Co.,* 324 U.S. 331. As was said by the Supreme Court in this case: "* * * To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress."

Parenthetically, it should be noted that the opinion below in the instant case uses the same quotation for the same point (R. 71) and cites *Haverty Realty & Investment Co.,* 3 T.C. 161, in exactly the same way (R. 77).

The Court of Appeals disagreed with the dissenters and affirmed the Tax Court in each case. Its opinion in the *Hamlin Trust* case is the more detailed and is the one referred to in the next remarks. In reaching its conclusion that the tax consequences of a contract at arm's length must be determined by its terms and not by superseded negotiations, the appellate court first concluded that the issue before it was one of law. It then rejected the contention that the contractual allocation should be upset because it had been made with very little discussion and without equal interest of both parties, using the following language:

> "It is true that there was very little discussion of the suggested allocation. But the effectiveness tax-wise of an agreement is not measured by the amount of preliminary discussion had respecting it. It is enough if parties understand the contract and understandingly enter into it. The proposed change in the contract was clear. All parties participating in the conference agreed to it. The owners of stock present signed the written contract at the time and others signed it later. It is reasonably clear that the sellers failed to give consideration to the tax consequences of the provision, but where parties enter into an agreement with a clear understanding of its substance and content, they cannot be heard to say later that they overlooked possible tax consequences. While acting at arm's length and understandingly, the taxpayers agreed without condition or qualification that the money received should be on the basis of $150 per share for the stock and $50 per share for the agreement not to compete. Having thus agreed, the taxpayers are not at liberty to

> say that such was not the substance and reality of the transaction."

We submit that the rule cuts both ways; the Commissioner is also bound by it.

Two intervening decisions by the Court of Appeals for the Seventh Circuit go beyond our position. In *Consolidated Apparel Co. v. Commissioner,* (CA 7, Oct. 23, 1953) 207 F. 2d 580, reversing 17 T.C. 1570, the appellate court enforced a novation between related parties because the rentals provided therein were reasonable. It said (207 F. 2d at 583):

> "But before a court can declare a contract to be a collusive subterfuge, there must be evidence to sustain that finding, or its equivalent."

It found no such evidence in the case before it, since the parties lived up to the contract in their conduct. In the second case (*Commissioner v. Oates,* (CA 7, Nov. 3, 1953) 207 F. 2d 711, affirming 18 T.C. 570), both the appellate court and the Tax Court agreed that the Commissioner was bound by a novation between unrelated parties, even though made to accommodate the taxpayer.

It is apparent that if the Commissioner is bound by a novation, even where made between related parties, then he certainly has no power to substitute a preliminary agreement for the later formal contract which the parties intended should supersede it, as he seeks to do here. And if there be a requirement even between unrelated parties, as the Seventh Circuit held there was between related parties, that the formal contractual terms be reasonable,

then petitioners' case can meet that test. Certainly it cannot be said that the sale of wine for the ceiling price is unreasonable.*

The Sixth Circuit has also had to reverse the Tax Court for refusing to give tax effect to contracts. In *Nelson v. Commissioner,* (CA 6, April 11, 1953) 203 F. 2d 1, this was done, the appellate court saying (203 F. 2d at 7):

> "In a free economy, courts are not permitted to make contracts for the parties, but merely to pass upon the legality of such contracts when made."

We submit that that admonition is controlling here.

II. THIS COURT HAS JURISDICTION TO DISREGARD FINDINGS OF FACT OF THE TAX COURT WHICH DISREGARD OR MISUNDERSTAND EVIDENCE IN THE RECORD.

Respondent seems to contend (Resp. Br. 20-22) that this Court is powerless to consider the merits of this appeal because of the findings of fact below. Two intevening decisions, one of which is from this Court, dispose of that contention.

In *Gensinger v. Commissioner,* (CA 9, Nov. 30, 1953) 208 F. 2d 576, this Court held that it was not bound by the Tax Court's findings as to the taxpayer's intent, and

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*In this connection, see *Albert T. Felix,* 21 T.C. No. 90, CCH Dec. 20,178, promulgated Feb. 26, 1954, a reviewed case, where the Tax Court sustained a sale and lease-back at OPA ceiling prices between related parties, saying:

> "The sale and lease arrangements between the trustee and the petitioners appear to have been entered into in good faith. The equipment was sold to the trust and leased back at prices fixed by the OPA, and so must be regarded as fair and reasonable."

reached a conclusion on that point contrary to that which the Tax Court had reached. In the instant case, the decision below can be sustained only if the Court rejects our contentions that the Tax Court erred in its conclusion that the formal contract did not express the parties' real intent. We have challenged this conclusion both as a matter of law and of fact. The *Gensinger* case supports our contention that after giving effect to the Tax Court's findings on basic facts as to which there was conflict in the evidence, this Court has jurisdiction to decide that those findings and the other facts as to which there was no conflict establish that the ultimate conclusion below as to intent was clearly erroneous.

Beamsley v. Commissioner, (CA 7, July 31, 1953), 205 F. 2d 743, is to the same effect. There too the Tax Court had disregarded the terms of a written contract, and had based a decision on ultimate findings of intent contrary to the terms of the contract. (18 T.C. 988.) In reversing, the appellate court reviewed the evidence, referring to much of that relied on below as "window-dressing." (205 F. 2d at 745.) It dismissed the finding, that the consideration paid was for something different than the contract said it was, as being based "upon speculation and conjecture." (205 F. 2d at 750.)

We submit that these cases hold a lesson applicable here. The evidence relied on here to disregard the contract notwithstanding the fact that the parties lived up to its terms in their conduct after it was signed, is quite as flimsy as that in the *Beamsley* case. Here too actual conduct was cast aside and the case was decided on speculation and conjecture.

III. IN ANY EVENT, REVERSIBLE ERROR OCCURRED AT THE TRIAL IN THE ADMISSION OF EVIDENCE OF A CRIME OF WHICH PETITIONER HAD NOT BEEN CONVICTED.

On November 17, 1952, this Court decided *Wolcher v. United States,* 200 F. 2d 493. We are not able to state at this time whether or not that case had been reported in the advance sheets when our earlier briefs were being written, but our research tools did not bring it to light until later. It is of such importance on this issue that we would necessarily refer to it in oral argument, and we conceive that it would be helpful to the Court if we should discuss it in this supplemental brief.

The *Wolcher* case was a criminal case in which a conviction was reversed because of the admission of evidence tending to establish that the defendant was guilty of another crime, of which he had never been convicted. The evidence was not offered for purposes of impeachment but as evidence supposedly bearing on the question of guilt of the crime charged. This is substantially the explanation respondent gives in support of the admissibility of similar evidence in the instant case (Resp. Br. 38, footn.; Pet. Reply Br. 2). The opinion of this Court explaining why the admission of the evidence was reversible error is as illuminating a discussion of the law as we have ever read, and therefore we set it forth in extenso (200 F. 2d at 497-498):

> "When there is proof that an act has been done and the question arises whether it was done with criminal intent, other similar acts by the accused may be proven for the purpose of demonstrating that he was acting at the time alleged in the indict-

ment with criminal intent and volition. In such cases the fact that the prior acts may themselves be criminal in character does not exclude them.

"At the same time we must bear in mind that the commission of a wrongful act charged cannot ordinarily be established by proof that the defendant has previously committed other wrongful acts. It is fundamental that such a method of proof is inadmissible merely for the purpose of showing that the defendant has a generally criminal disposition or character. Hence, if in order to prove intent, evidence is to be received of other wrongful acts, the acts thus proven must be of such character that as a matter of logic they tend to demonstrate a criminal intent at the time of the commission of the act now charged. For one thing the prior acts must be similar to the one now charged.

"The caution which the courts must exercise in such cases is well set forth in Boyer v. United States, 76 U.S. App. D.C. 397, 132 F. 2d 12, 13. In that case, while the prior act proven was similar to that charged, the receipt of the proof of the prior act was held to be error because it occurred nearly two years before the date charged in the indictment. The general rule, relating to admission or exclusion of evidence of such acts was stated as follows in 132 F. 2d at page 13: 'In various circumstances, therefore, evidence of earlier acts good or bad may be admitted, as tending in one way or another to show a man's state of mind, when he is charged with a later fraud. But the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are "so connected with the offense charged in point of time and circumstances as to throw light upon the intent." '

"In the case before us the circumstances relating to the preliminary draft of the partnership return were in no way connected 'in point of circumstances' with the offense charged in the indictment. The only resemblance between the two sets of acts would be that both had to do with tax returns. But the partnership return was of an entirely different nature from the transaction for which the defendant was here on trial. The evidence relating to the partnership was not logically relevant either to prove or disprove the intent or knowledge of Wolcher in connection with his performance of the acts shown at the trial and charged in the indictment.

* * * * * * *

"The jury * * * were * * * permitted to infer defendant's guilt from the fact of a prior unrelated, dissimilar wrongful act. As stated in Boyer v. United States, supra, 132 F. 2d at page 13, 'No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise, and confusion of issues is thought to outweigh its probative value. The law seeks "a convenient balance between the necessity of obtaining proof and the danger of unfair prejudice." *The alleged fact that a man committed one forgery clearly increases the likelihood that he committed another forgery, but testimony to the earlier crime is not, for that reason alone, admissible.*' We hold that it was error to admit the working copy of the Gold Coast partnership return in evidence." (Emphasis ours.)

The agreement expressed with the District of Columbia case of *Boyer v. United States,* 132 F. 2d 12, is also notable. It is evident that the *Wolcher* case applies the rule prevalent in the District of Columbia, which the courts in that jurisdiction apply in civil cases as well as in criminal cases. (Pet. Op. Br. p. 15.) Since the Tax Court is bound to apply the rules of evidence in effect in the District of Columbia, it committed reversible error in admitting the evidence of unconvicted crime, whether it was for purposes of impeachment as trial counsel for respondent said, or to establish a substantive fact, as his brief here argues.

CONCLUSION.

The judgment of the Tax Court should be reversed.

Dated, San Francisco, California,
March 23, 1954.

Respectfully submitted,
VALENTINE BROOKES,
ARTHUR H. KENT,
Attorneys for Petitioners.

No. 13503

IN THE

United States Court of Appeals For the Ninth Circuit

GIULIO PARTICELLI, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

ESTATE OF ELETTA PARTICELLI, Deceased, and ARTHUR GUERRAZZI, Executor, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petitions for Review of the Decisions of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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On Petitions for Review of the Decisions of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 59-79) are not officially reported.

JURISDICTION

The petitions for review in these cases involve deficiencies in income and victory taxes asserted against the taxpayers by the Commissioner and redetermined by the Tax Court in the total sum of $100,270.72 on the

basis of their community income for the calendar year 1943. (R. 80-81, 82-88.) On July 21, 1949, the Commissioner mailed to the taxpayer and his wife separate notices of deficiencies in income and victory taxes in the sum of $62,222.85 each, aggregating $124,445.70, for 1943. (R. 11-19, 31-33.) Within ninety days thereafter and on October 17, 1949, they filed petitions with the Tax Court for redetermination of such deficiencies under the provisions of Section 272 of the Internal Revenue Code.[1] (R. 3-19, 25-33.) The decisions of the Tax Court redetermining and sustaining in large part the deficiencies asserted by the Commissioner were entered on May 1, 1952.[2] (R. 80-81.) The cases are brought to this Court by the petitions for review filed by the petitioners on July 21, 1952 [3] (R. 82-84, 86-88), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

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[1] The taxpayer's wife having died on October 12, 1949, her executor, Arthur Guerrazzi, filed the petition in behalf of her estate for redetermination of the deficiency by the Tax Court on October 17, 1949 (R. 25-33), and an amendment thereto on January 3, 1950 (R. 39-40), and he was substituted as party-petitioner by order of the Tax Court entered on November 21, 1949 (R. 34-35; Pet. Br. 1-2). Since the tax liabilities of both petitioners depend entirely upon the business transactions of taxpayer Giulio Particelli, our references hereinafter in the singular to "the taxpayer" are to him, in the plural, to both petitioners.

[2] The deficiencies redetermined by the Tax Court (R. 80-81) in lesser amounts than those determined by the Commissioner are accounted for in part by the fact that several other issues were settled in the Tax Court by stipulation of the parties (R. 59).

[3] These cases were consolidated for purposes of hearing and disposition in the Tax Court (R. 59), and also for purposes of briefing, argument, single proceeding and record in this Court by order entered on August 2, 1952 (R. 91), pursuant to stipulation of the parties (R. 90).

QUESTION PRESENTED

The taxpayer sold his wine inventory of 275,000 gallons, together with his winery plant and equipment, for the total sum of $350,000 in the taxable year 1943 under a contract of sale specifying that amount as the selling price of both the wine and the winery, without specifying the *actual* consideration for each class of property. The Tax Court, upholding the propriety of the Commissioner's method of allocation to reflect the real consideration paid for the wine and the winery, allocated the entire proceeds of the sale as a lump-sum payment attributable to the wine and the winery in the respective amounts of $275,000 and $75,000, based on the fair market value—in excess of the ceiling price established by the Office of Price Administration—of $1 a gallon for the wine at the time of the sale on December 6, 1943.

The question presented is whether the Tax Court correctly sustained in most part the Commissioner's determination allocating the proceeds as a lump-sum payment derived from the sale of the taxpayer's wine inventory and winery plant in the taxable year 1943 between ordinary income and capital gain, on the ground that a consideration of the actual substance of the transaction shows that the allocation provisions of the written contract of sale were self-serving and wholly inoperative and therefore did not reflect the real agreement between the parties.

STATUTE INVOLVED

The pertinent provisions of the statute involved are printed in the Appendix, *infra.*

STATEMENT

The pertinent facts—some of which (including exhibits) were stipulated by the parties (R. 43-58) and found by the Tax Court by reference accordingly (R.

59)—were found by the Tax Court as follows (R. 59-70):

The taxpayer Giulio Particelli, a resident of Sebastopol, California, and the decedent were at all times material husband and wife. Giulio Particelli, whose transactions gave rise to the question in issue, will be referred to for convenience as the taxpayer. (R. 59-60.)

The taxpayer was born in 1891 and migrated to this country from Italy. He speaks and understands but can not read English. His spoken English is a somewhat broken dialect and is difficult for those not accustomed to it to understand. (R. 60.)

The taxpayer commenced the production of wine on a small scale on his farm shortly after the repeal of prohibition. In 1941 he commenced and, prior to the grape crush in 1943, fully completed the construction of a larger winery at Forestville, California, known as the Lucca Winery. The winery was equipped to crush grapes, to ferment the juice into wine, to rack and filter wine and store 256,000 gallons. The winery was not equipped to finish wine beyond the aging, racking and filtering stages. The taxpayer's equipment for bottling wine was located in his retail store, which was located about 300 feet from the winery. (R. 60.)

Prior to October 22, 1943, the Office of Price Administration (hereinafter referred to as OPA) had a ceiling on bulk dry wine of 21½¢ a gallon, plus an amount not in excess of 6¢ a gallon, computed on the basis of cost of grapes in 1942 over 1941, not exceeding $28.20 a ton. Effective October 22, 1943, the OPA placed a flat ceiling of 28¢ a gallon, and 33¢ a gallon on bulk current red and white wines, respectively. At the same time it set flat ceilings for bottled wines. (R. 60.)

The taxpayer sold wine of his own production and of established winemakers. His wine was not finished and was the poorest and cheapest of the grades which he

sold. His own wine would cloud and he could not sell it in bottles. He sold his own wine only in bulk in lots of 5, 10, 15, 25 or 50 gallons, or in carload lots when blended with finished wines. He generally sold the other wines in one-fifth, half-gallon and gallon bottles. (R. 60-61.)

Most of the wine sold by the taxpayer in 1943, prior to November of that year, had been purchased from other producers. The various types and classes of the wine were sold from 45¢ to $1.40 a gallon. He sold his own production of wine for 32¢ a gallon in 50-gallon lots, 33 to 35¢ in 25-gallon lots, and 38¢ a gallon in 5-gallon lots. All of the prices included federal and state alcoholic beverage taxes, which in 1943 totaled 11¢ a gallon. (R. 61.)

During the same period the taxpayer made one sale of about 60,000 gallons of wine in carload lots to a winery located in Ohio. The wine so sold was a blend in the ratio of ten parts of his production in 1942 to one part of some finished wine which he had purchased from another winery. The OPA ceiling price for the wine was about 27½¢ a gallon. The proceeds of the sale were $51,800.95. (R. 61.)

The taxpayer's crush of wine in 1943, consisting of about 245,000 gallons, was started in September and was completed in November. At that time he had about 30,000 gallons of wine on hand from his crush of about 100,000 gallons in 1952. The cost of the wine produced by the taxpayer in 1943 was from 50¢ to 52¢ a gallon. At that time he and other wine producers expected that the OPA would increase the ceiling price of wine sold in bulk. (R. 61-62.)

A blend of finished wine with unfinished wine will not produce finished wine. The winery which on two occasions had finished some wine for the taxpayer refused to do so again. Unless he could have his wine fin-

ished or blend it with finished wine the taxpayer could not sell his wine as case goods, because it would cloud and spoil, but he could sell it in bulk. In December, 1943, the taxpayer's prior sources of supply for finished wine in bulk for blending purposes refused to sell him finished wine except as case goods, the price of which made the cost too high to use for blending. (R. 62.)

The taxpayer, since 1934, had a line of credit from the Bank of Sonoma County or its predecessor on a secured and unsecured basis. On December 1, 1943, the taxpayer owed the bank $70,000 secured by all of his assets. (R. 62.)

Orders issued by the Federal Government to control the disposition of grapes created a scarcity of grapes in 1942 and 1943 available for producing wine and intensified the extremely high demand for wine in those years. During 1942 and 1943 the price of grapes was not subjected to regulation by public authority. In 1942 wineries paid an average of $30 a ton for grapes and in 1943 an average of $79. The normal crush of dry wine from a ton of grapes is about 160 gallons. Prior to 1942 about 80% of all the wine produced in California was sold in bulk. Thereafter, there was a trend toward sales of wine in bottles, and by October or November, 1943, bulk sales of unfinished wine had practically ceased. By the end of 1943 bulk sales of unfinished wine at the prevailing ceiling prices had ceased entirely. The cost of grapes in 1943 prevented wine producers from making a profit on bulk sales of unfinished wine at the ceiling price. There was no active market for wineries in 1943 without an inventory of wine. During that year, to obtain wine, bottlers were compelled to buy the winery in order to obtain the owner's inventory of wine. (R. 62-63.)

During 1943 three methods were used by operators of wineries to legally dispose of their inventory of un-

finished wine at prices in excess of OPA ceilings on bulk sales. One of the methods, known as contract or franchise bottling, which was commenced about October, 1943, consisted of shipping the wine to a bottler to be bottled for the account of the winery, and then selling the bottled wine to the bottler. That method enabled the wine producer to obtain from 75¢ to $1.25 a gallon for his wine, depending upon its quality. Another plan, adopted in 1942, consisted of a sale by the wine producer of his inventory of wine and winery in one transaction for a lump sum price. The other method was one in which a bottler acquired the production of a winery by advancing funds for grapes to be crushed for the account of the bottler. The OPA issued a ruling in the fall of 1943 in response to a request of the Wine Institute, a trade and service organization for the wine industry of California, which constitutes about 90% of the wine industry of the United States, that it would not interfere with the contract or franchise bottling method. During 1942, 1943 and 1944, 50 to 60 wineries in California, which constituted more than one-half of the production capacity of wineries in California, were purchased in order to obtain their inventories of wine. Of the 50 to 60 wineries so sold during the period of three years, 20 or 25 were sold in 1943. In 1943 bottlers of wine searched sources of supply for wine and a producer was not required to exert any effort to sell his wine. (R. 63-64.)

In December, 1943, John Dumbra (hereinafter referred to as Dumbra) was in California for the purpose of locating wine for purchase by his employer, the Tiara Products Company (hereinafter referred to as Tiara), general wine merchants, with its principal office in New York City. Dumbra first discussed the purchase of wine from the taxpayer in Santa Rosa, California, the evening of December 4, 1943. After

tasting the wine at the Lucca Winery the next day and finding it satisfactory, Dumbra offered to purchase three or four cars of the wine at the taxpayer's price. The taxpayer's ceiling price for the wine was not discussed. The taxpayer's reply to the offer was that he could not make a profit on sales of his wine in such quantities and as he wished to get out of the winery business, the only transaction he would consider would be one for the purchase of all of his wine and the winery. Further discussions resulted in an offer of the taxpayer to sell his inventory of wine and the winery for $350,000. Dumbra made a counter offer of $330,000, subject to approval of his principal. Later the same day Dumbra consulted his brother, Victor Dumbra, president and general manager of Tiara, who authorized him to buy the wine and winery, paying, if necessary, the asking price of the taxpayer. Tiara did not want the winery but was willing to acquire it, if necessary, to obtain the wine at an overall price it could afford to pay. The taxpayer would not accept less than $350,000 for the winery and his inventory of wine and Tiara accepted the taxpayer's offer to sell at that price. The taxpayer informed Dumbra that "he was going to draw up the whole thing together," specifying one price for the wine and another for the winery and that "the price would be $350,000", to which Dumbra had no objection, provided the price did not exceed $350,000 and the quantity of wine was correct. Dumbra did not at any time agree to purchase the wine for $77,000 and the winery for $273,000. Tiara was compelled to purchase the winery to obtain the wine. While Dumbra at times felt that he was not understanding the taxpayer correctly, all of his doubts in that regard were eliminated before the negotiations were completed. (R. 64-65.)

Dumbra and the taxpayer met in the office of the taxpayer's accountant in San Francisco on December 6,

1943. While there the taxpayer requested his accountant to compute the ceiling price on sales of bulk wine, which he did, and determined a price of not in excess of 28¢ a gallon, and so advised the taxpayer (R. 65). Thereafter, on the same day, the taxpayer and Dumbra, acting for Tiara, executed an instrument reading in part as follows (R. 66):

Agreement of Sale

Receipt of the sum of $5,000.00 to apply on the total purchase price of $350,000.00 is hereby acknowledged this sixth day of December, 1943, by the undersigned, G. Particelli, for the following purposes:

It is hereby understood and agreed that the said G. Particelli will sell to John Dumbra, and the said John Dumbra agrees to buy, all that certain winery known as Lucca Winery located at Forestville, Sonoma County, California, together with two acres more or less of land on which said winery is located, all buildings now located thereon, all fixtures, equipment, supplies (other than wine), goodwill, trade names, formulas, and all other personal property of every kind and description now belonging to or a part of said Lucca Winery, for the total sum of $273,000.00.

It is further understood and agreed that the said G. Particelli will sell to John Dumbra, and the said John Dumbra agrees to buy, 275,000 gallons of wine now in storage in said Lucca Winery at the total price of $77,000.00.

It is further understood and agreed that the balance of said total purchase price for both the said winery and wine, amounting to $345,000.00, will be paid on or before December 21, 1943, at which time

said G. Particelli agrees to furnish clear title to said real and personal property.

* * * * *

The agreement was drafted by the taxpayer's attorney in accordance with instructions given to him by the taxpayer. (R. 66-67.)

The Bank of Sonoma County acted as escrow agent for the parties in completing the transaction. On December 21, 1943, Tiara's attorney signed on behalf of Tiara, and delivered two letters of instructions to the escrow agent. One of the letters recited that Tiara was transmitting its check for $77,000 for delivery to the taxpayer upon the delivery of a bill of sale for 256,000 gallons of dry table wine located at Lucca Winery and 19,000 gallons of like wine located in the Scatena Bros. Winery, Healdsburg, California. The other letter recited that there was transmitted therewith Tiara's check of $268,000 for delivery to the taxpayer upon receipt of a deed and bill of sale for all of the property in the Lucca Winery other than the wine. The taxpayer directed the escrow agent in writing to deliver his bill of sale for the wine on payment of the amount of $77,000 "which represents a sale of 275,000 gallons of wine at our ceiling price of 28¢ per gallon." Other instructions of the taxpayer to the escrow agent were to deliver the deed and bill of sale covering the winery to Tiara upon receipt of the amount of $268,000 and authorized it to place revenue stamps of $110 on the deed. The revenue stamps were based upon a valuation of $100,000 for the real estate conveyed. The amounts of the checks actually delivered to the escrow agent with the letters were $330,000 and $15,000. Delivery of the deed and bill of sale for the winery was to be made not later than March 1, 1944, but was not actually made until May 1, 1944, on account of delay in obtaining a license in the name of the buyer. The proceeds of the checks totaling

$345,000 were credited to the bank account of the taxpayer on December 31, 1943. (R. 67-68.)

The wine and winery were entered on the books of Tiara at cost prices of $77,000 and $273,000, respectively. The amounts were used as cost in income and excess profits tax returns of Tiara. The entries were made by a bookkeeper under the supervision of Tiara's independent accountant, who obtained the figures entered in the books from the letters of instruction of the taxpayer and Tiara to the escrow agent and the sales contract. The accountant was the tax adviser of Tiara but was not consulted by anyone on behalf of Tiara prior to the purchase about any aspect or consequences of the purchase. The figure of $77,000 was entered in the books as the cost of the wine because that amount was set up in the contract of sale as the selling price. Victor Dumbra did not learn of the entry for the wine until some undisclosed time after it was made. (R. 68.)

Tiara did not in 1943 endeavor to purchase or purchase a winery without wine. It considered that it was paying from $1 to $1.12 per gallon for the wine acquired from the taxpayer, which was a price it could afford to pay in view of the prevailing high ceiling prices for wine in bottles, and the remainder for the winery. Tiara purchased the winery in order to obtain the wine. Tiara could make a net profit of about $2 a gallon on bottled wine, less the cost of the wine itself. (R. 68.)

There was no active market in 1943 and 1944 for wineries without an inventory of wine to sell with them. A few months after acquiring title to the Lucca Winery, Tiara offered the property for sale at the price of $60,000 but would have accepted an offer of $55,000 or $50,000. It refused offers of $40,000 and $45,000. There was a break in the market for wineries producing dry wines and the winery was sold in December, 1944, for $20,000. Tiara's accountant advised it in 1944 that there would

be a tax advantage to it in selling the winery in that year. (R. 68-69.)

Tiara purchased wineries, other than the Lucca Winery, with their inventories of wine. One of such purchases was made in California in December, 1943. At the time of their acquisition Tiara understood that regulations of the OPA permitted it to sell the wine so acquired at its ceiling prices for bulk and case goods. During the latter part of 1944 it learned that such ceiling prices applied only on deliveries of wine to customers from its own facilities and if it made deliveries to the customer from the winery which produced the wine, the applicable ceiling price was the ceiling of the winery which had been purchased. From 40% to 50% of the wine acquired by Tiara from the taxpayer was sold direct to customers from the Lucca Winery. (R. 69.)

The taxpayer was employed by Tiara in December, 1943, at a salary of $100 per week to take care of the Lucca Winery. Before the sale involved herein was closed the taxpayer, with the consent of Tiara, withdrew 1,000 gallons of the wine for his personal use. In May, 1944, when the contract of employment was terminated and Tiara owed the taxpayer $1,500 for his services, the taxpayer allowed Tiara a credit of $1,000 for the wine withdrawn by him. (R. 69-70.)

Of the total consideration of $350,000 involved in the transaction, $275,000 was paid for the wine and $75,000 for the winery. (R. 70.)

In their returns for 1943 the taxpayers reported that the sale to Tiara on December 6, 1943, constituted a sale of wine for $77,000 and the winery for $273,000. Capital gain on the sale of the winery was computed on a cost basis of $61,165, less $5,799 for depreciation. In his determination of the deficiencies, the Commissioner allocated $302,000 of the total selling price to the sale of

wine and $47,500 to the winery and decreased the adjusted cost basis of the winery to $26,420. (R. 70.)

Upon the basis of the foregoing facts, the Tax Court, modifying and upholding in large part the Commissioner's determinations (R. 11-19, 31-33), allocated, as between ordinary income and capital gain, the entire sales price considered as a lump sum payment between the wine and the winery plant based on the fair market value of the wine, in excess of the ceiling price fixed by the Office of Price Administration, at the time of the sale in the taxable year (R. 70-79). The Tax Court thereupon entered its decisions accordingly (R. 80-81), from which the taxpayers petitioned this Court for review (R. 82, 86).

SUMMARY OF ARGUMENT

It is clear, upon a consideration of all the evidence, that the transaction here in question was in substance a sale of two classes of property for the total consideration of $350,000, without any *bona fide* agreement of the parties as to the real price of each class of property involved. The determination of the issue is a question of fact for the Tax Court, and its findings in respect thereto may not be properly set aside where they are supported by substantial evidence, as here. The Tax Court found, upon a consideration of all the evidence, facts and circumstances considered as a whole, that the written contract of sale does not reflect the real agreement of the parties thereto, that the substance of the transaction between them was the sale of the wine and the winery for a lump-sum consideration without any actual agreement as to the selling price for each class of property, and that accordingly the wine was sold for $1 a gallon fair market value, or $275,000, and the winery for the remainder, or $75,000. These findings, contrary to the taxpayer's contentions, are abundantly

supported by the evidence, are not shown to be in anywise erroneous, and should therefore be affirmed upon review.

Thus, the evidence clearly shows that the transaction was in substance a sale of two classes of property for a lump-sum consideration without a *bona fide* agreement of the parties as to the price of each class. The taxpayer declined the purchaser's offers to buy the wine in carload lots, and would sell his entire inventory of wine only along with the winery plant and equipment. Upon ascertaining the OPA flat ceiling price for the sale of such wine, the taxpayer had the contract of sale drafted accordingly, to which the purchaser agreed because it made no difference to it either way so long as it acquired the taxpayer's total quantity of 275,000 gallons of wine contracted for. Nor did the purchaser actually want the winery but agreed to take it along with the wine in order to obtain the latter, which it really wanted.

Moreover, while the purchaser entered on its books the figures shown in the contract of sale and reported them in its tax returns, nevertheless this was of no significance for it merely thereby formally followed the written contract of sale, as the Tax Court found. However entered on the books and reported in its tax returns, the purchaser could in any event obtain the benefit of loss deductions and minimum taxes upon disposition of the wine and winery in the same year. In these circumstances, while the negotiations for the sale were arm's length transactions in so far as the determination of the *total* selling price was concerned, yet this cannot be said of the allocation provisions inserted in the contract of sale at the taxpayer's behest for they are not shown to have served any fundamental or functional purpose in the actual performance of the contract, other than possible tax avoidance. Accordingly,

it is clear that the Tax Court was fully warranted in making the allocations of the total proceeds received from the sale to each the wine and the winery in appropriate amounts. Notwithstanding the express language of the allocation provisions of the written contract of sale, a consideration of the record as a whole shows quite clearly that they do not reflect the actual substance of the agreement and the real intent of the parties to the transaction in question; rather, they show that the sale transaction involved in fact a single, indivisible contract for the sale of both the wine and the winery for a total lump consideration, and not the sale of each for a separate money consideration as claimed by the taxpayer.

Finally, the evidence shows that the Tax Court properly allocated the total selling price between the wine and winery based on the evidence and the resulting finding of the actual fair market value of the wine at the time of the sale. This was based on the testimony of several disinterested witnesses as to the fair market value of such wine sold under the permissible method used by the taxpayer to dispose of his wine, namely, the sale of both wine and winery in one package unaffected by the OPA price ceiling regulations. This clearly contradicted the taxpayer's conflicting and incredible testimony. Moreover, Tiara's sale of the winery thereafter for $20,000 conclusively shows, we submit, that it certailny did not pay $273,000 for the winery as set forth in the contract of sale to suit the taxpayer's fancy tax-wise, as shown by the testimony of its president and general manager Victor Dumbra; at most, according to the evidence, it really paid not more than $75,000 for the winery, as allocated thereto by the Tax Court. It follows that the balance ($275,000) must necessarily have represented the true sale price of the wine, as found by the Tax Court upon all the evidence.

ARGUMENT

The Tax Court's Finding, Based Upon All the Evidence, Reallocating the Total Proceeds Received by the Taxpayer as a Lump-Sum Payment from the Sale of Both His Wine Inventory and Winery Plant Between Ordinary Income and Capital Gain, Respectively, on the Basis of the Fair Market Value of the Wine, Is Not Shown to be Clearly Erroneous.

The question presented for decision is whether the Tax Court correctly found, upon all the evidence, that the substance of the transaction between the taxpayer and Tiara for tax purposes was an arm's length sale of two classes of property for one price for both, without a ceiling price to limit the consideration or any agreement of the parties as to the selling price of each class of the property, and that therefore a proper allocation of the total proceeds of $350,000 received by the taxpayer as a lump sum payment from the sale of both his wine inventory and winery plant between ordinary income and capital gain is $275,000 for the wine sold at $1 a gallon and $75,000 for the winery plant.

Stated otherwise, the issue involves the ascertainment of the real substance of the sale transaction in which the taxpayer sold his 275,000 gallons of wine together with his winery plant for a total consideration of $350,000, and in turn a determination as to whether the self-serving and wholly inoperative provisions of the contract of sale, arbitrarily allocating the selling price between the wine and winery in the respective amounts of $77,000 and $273,000, are binding on the Commissioner for income tax purposes.

The Tax Court, upon a review of all the evidence, facts and circumstances considered as a whole, found that the written contract of sale in question does not reflect the actual agreement of the parties; that the substance of the transaction between them for tax purposes is an arm's length sale of two classes of property—

wine inventory and winery plant—for the total amount of $350,000 for both, without a ceiling price to limit the consideration or any agreement of the parties as to the selling price of each class of property; that it was therefore proper for the Commissioner to have made an allocation reflecting the consideration paid for the wine and for the winery (R. 77, 78); and, ultimately, that of the total consideration of $350,000 involved in the transaction, the wine was sold for $1 a gallon, or $275,000, and the remainder of $75,000 represents the selling price of the winery (R. 70, 79). The taxpayer claims that this is error. (Br. 19-55.)

The taxpayer contends, substantially as in the Tax Court (R. 70), that he entered into an arm's length transaction for the sale of his wine inventory for $77,000 and the winery plant for $273,000, which agreement was embodied in the contract of sale, and therefore the contract, not being a sham, may not properly be disregarded by the Commissioner and the Tax Court (Br. 19-42). He argues further that the fair market value of the wine could not have exceeded its ceiling price established by the OPA, and that it was therefore error for the Tax Court to assign a higher selling price to it as the fair market value (Br. 43-55), the Tax Court's findings to the contrary purportedly not being supported by substantial evidence (Br. 42-43). The selling price claimed by the taxpayer for the wine came to 28¢ a gallon (R. 60), which he contends was the maximum limit for which he could sell the wine under the OPA price regulations in effect at the time of the sale in December, 1943 (Br. 23, 41). He therefore contends, in effect, as in the Tax ourt (R. 70-71), that the contract was a divisible contract involving separate independent sales of the wine and the winery for separate money considerations.

It is our position (a) that the transaction in substance was a sale of two classes of property for the lump-sum consideration of $350,000, without any *bona fide* agreement of the parties as to the real sale price of each, and consequently the Tax Court properly sustained in large part, with appropriate modifications, the Commissioner's allocation between ordinary income and capital gain of the proceeds of the sale to the wine and the winery on the basis of the fair market value of the wine, in excess of the OPA ceiling price, at the time of the sale in December, 1943; and (b) that while the negotiations for the sale were arm's length transactions in respect of the determination of the total selling price of $350,000 for both the wine and the winery, as contended by the taxpayer, yet this is clearly not true with respect to the allocation provisions of the contract of sale which, at the taxpayer's request, were inserted in the contract and consented to by thepurchaser—to whom it made no difference either way—merely as an accommodation to the taxpayer, particularly in the light of the consideration that such provisions are not shown to have served any fundamental or functional purpose in the actual performance of the contract, except tax avoidance. The evidence in support thereof is clear and convincing, and upon a careful scrutiny of the transaction in question as to the real intent of the parties, it impeaches, as *mala fides* and unsustainable, the arbitrary allocation provisions of the written contract of sale in so far as they affect and substantially decrease the true income tax liability of the taxpayers for the taxable year involved, as the Tax Court in effect found and held. (R. 70-79.)

A. The Transaction in Substance Was a Sale of Two Classes of Property for the Lump-Sum Consideration of $350,000, Without Any Bona Fide Agreement of the Parties as to the Real Price of Each

Whether there was an arm's length transaction for the sale of both the wine and the winery made pursuant to separate negotiations as to each at the fixed prices set forth in the contract of sale, as contended by the taxpayer, or a sale of both classes of property for a lump sum requiring allocation as to each class, as contended by the Commissioner, was clearly a question of fact to be determined by the trier of facts from a consideration of all the evidence; and the substance thereof must be ascertained from all the relevant facts and circumstances of the transaction taken into account and considered as a whole, as the Tax Court held. (R. 70-71.) *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, 333-334; *United States* v. *Cumberland Pub. Serv. Co.*, 338 U. S. 451, 454.

The Tax Court, upon the basis of all the evidence, facts and circumstances considered as a whole, made ultimate findings as follows (R. 70, 77, 78, 79):

> Of the total consideration of $350,000 involved in the transaction, $275,000 was paid for the wine and $75,000 for the winery.
>
> * * * * *
>
> We conclude from a consideration of all of the evidence here that the written contract of sale does not reflect the agreement of the parties and the substance of the transaction between them was a sale of the wine and winery for $350,000 without any agreement on a selling price for each class of property. * * *
>
> * * * * *
>
> The substance of the transaction here for tax purposes, as already pointed out, is an arm's length sale of two classes of property for one price for

> both without a ceiling price to limit the consideration. * * *
>
> * * * * *
>
> Considering all of the evidence on the question we conclude that the wine was sold for $1 a gallon, or $275,000, and that the remainder of $75,000 represents the selling price of the winery.

These findings, contrary to the taxpayers' contentions (Br. 42-43), are supported by an abundance of evidence, clear and convincing, and have not been shown to be clearly erroneous. The taxpayer does not and can not show that they are in any wise erroneous. It was the function of the Tax Court to weigh and draw its own inferences from the evidence, conflicting or otherwise.[4] *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 342; *United States* v. *Real Estate Boards,* 339 U. S. 485, 495-496. Moreover, it is axiomatic that the trial judge is not required to accept uncontradicted testimony where there are facts or circumstances which tend to refute it, as here. *Quock Ting* v. *United States,* 140 U. S. 417, 420-421, 422; *Sartor* v. *Arkansas Gas Corp.,* 321 U. S. 620, 627-628; *Menefee* v. *W. R. Chamberlin Co.,* 176 F. 2d 828, 833, fn. 11, modified and affirmed, 183 F. 2d 720 (C. A. 9th); *Broadcast Music* v. *Havana Madrid Restaurant Corp.,* 175 F. 2d 77 (C. A. 2d); *Spero-Nelson* v. *Brown,* 175 F. 2d 86, 90 (C. A. 6th); *First National Bank* v. *Commissioner,* 125 F. 2d 157 (C. A. 6th); *Burka* v. *Commissioner,* 179 F. 2d 483 (C. A. 4th); *Greenfeld* v. *Commissioner,* 165 F. 2d 318 (C. A. 4th). This rule applies even as to the taxpayer's testimony of intention. *Wil-*

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[4] In this connection the Tax Court stated (R. 72) that "No useful purpose would be served by a detailed discussion of all of the conflicting evidence."

mington Co. v. *Helvering,* 316 U. S. 164, 167; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 295. Nor is the Tax Court bound to accept uncontroverted testimony "when there are facts which even indircetly may give rise to inferences contradicting the witness." *Cohen* v. *Commissioner,* 148 F. 2d 336, 337 (C. A. 2d). It is settled that so long as the trial tribunal's findings are supported by the evidence and are not shown to be clearly erroneous, as here, due regard being given to the opportunity of the trier of facts to judge the credibility of the witnesses, they may not properly be set aside but should be accepted on appeal. Rule 52 (a), Federal Rules of Civil Procedure; *United States* v. *Gypsum Co.,* 333 U. S. 364, 395-396, rehearing denied, 333 U. S. 869; *Commissioner* v. *Court Holding Co.,* 324 U. S. 331, 333-334; *United States* v. *Cumberland Pub. Serv. Co.,* 338 U. S. 451, 456; *Joe Balestrieri & Co.* v. *Commissioner,* 177 F. 2d 867, 873-875 (C.A. 9th); *Ruud* v. *American Packing & Provision Co.,* 177 F. 2d 538 (C.A. 9th); *Grace Bros* v. *Commissioner,* 173 F. 2d 170 (C.A. 9th).

In the first place, we recognize that the taxpayers are entitled to decrease the amount of what otherwise would be their taxes or altogether avoid them by any *bona fide* means which the law permits (*Gregory* v. *Helvering,* 293 U. S. 465, 469; *Commissioner* v. *Tower,* 327 U. S. 280, 288); and that where the law is clear as to tax consequences resulting from a particular course of action, such course of action will be given effect and be governed by the clear provisions of the law, even though it was followed for the primary purpose of tax avoidance (*United States* v. *Cumberland Pub. Serv. Co.,* 338 U. S. 451). But where tax avoidance is the primary motive of a particular transaction, as we submit is the clear case here, that transaction should be closely scrutinized for the purpose of revealing the substance which

will prevail over form. *Yiannias* v. *Commissioner,* 180 F. 2d 115 (C.A. 8th).

The Commissioner most earnestly submits that where, as here, coincidently and contemporaneously with the sale of both wine and winery the taxpayer, with the consent of the purchaser, juggled the figures in the contract of sale for the obvious reason of avoiding taxes by showing therein ordinary income taxable in full at higher rates ostensibly as capital gains taxable only to the extent of 50% thereof at lesser rates (as shown hereinafter), the line of delineation marking out the field of legitimate tax avoidance has been breached. In this light, the Tax Court, looking through form to substance and giving effect to realities, had no alternative than to find that the written contract of sale does not reflect the real agreement of the parties and the substance of the transaction in question. (R. 77.) Tax consequences are dependent upon the real nature of the transaction, not on the label attached to it by the parties. *Strauss* v. *Commissioner,* 168 F. 2d 441, 442 (C.A. 2d), certiorari denied, 335 U. S. 858, rehearing denied, 335 U. S. 888. As this Court stated in *Nordling* v. *Commissioner,* 166 F. 2d 703, 704, certiorari denied, 335 U. S. 817, "In tax matters the realities of a transaction, not artificialities, are given effect." See also *Gregory* v. *Helvering,* 293 U.S. 465, 469.

Next, as the Tax Court, citing *Commissioner* v. *Court Holding Co.,* and *United States* v. *Cumberland Pub. Serv. Co.,* both *supra,* properly stated (R. 71), the contract of sale here (R. 45-46, 66) is not controlling if its form differs from the substance of the transaction which, as pointed out, must be ascertained from *all* the evidence and circumstances with respect to the entire transaction considered as a whole. The quotation taken from the *Court Holding Co.* case by the Tax

Court (R. 71) is so apt that we repeat it here. There the Supreme Court, considering whether the sale was in substance made by the corporation or by its stockholders, stated (324 U. S. 331, 333-334):

> There was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the courts. *Dobson* v. *Commissioner,* 320 U. S. 489; *Commissioner* v. *Heininger,* 320 U. S. 467; *Commissioner* v. *Scottish American Investment Co.,* 323 U. S. 119. On the basis of these findings, the Tax Court was justified in attributing the gain from the sale to respondent corporation. The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

Likewise, in the *Cumberland Pub. Serv. Co.* case, also quoted in part by the Tax Court (R.71-72), the Supreme Court, resting its decision, as in the *Court Holding Co.* case, upon the ultimate finding of the trial court, stated (338 U. S. 451, 456) that —

> It is for the trial court, upon consideration of an entire transaction, to determine the factual category in which a particular transaction belongs.* * *

It distinguished but reaffirmed (p. 454, fn. 3) its holding in the *Court Holding Co.* case, as follows:

> What we said in the *Court Holding Co.* case was an approval of the action of the Tax Court in looking beyond the papers executed by the corporation and shareholders in order to determine whether the sale there had actually been made by the corporation. We were but emphasizing the established principle that in resolving such questions as who made a sale, fact-finding tribunals in tax cases can consider motives, intent, and conduct in addition to what appears in written instruments used by parties to control rights as among themselves. See, e.g., *Helvering* v. *Clifford,* 309 U. S. 331, 335-337; *Commissioner* v. *Tower,* 327 U. S. 280.

Compare also *Commissioner* v. *Culbertson,* 337 U. S. 733, 742. Hence, the decision in the present case should, we submit, likewise rest upon the ultimate findings of the Tax Court, supported as they are by substantial evidence.

A resume of the crucial findings of the Tax Court (R. 60-70) discloses that the taxpayer sold his entire winery business, including the wine, under the contract of sale of December 6, 1943, to Tiara for $350,000. The buyer was mainly interested in buying the wine but was willing to buy the winery plant, if necessary, in order to get the seller's inventory of wine. The taxpayer was not interested in selling the wine alone because it cost him 50¢ a gallon to make, and the OPA ceiling price on sales thereof by him was 28¢ a gallon. The wine was worth $1 a gallon on the free market. The contract of sale specifically stated the consideration as $273,000 for the winery and $77,000 (28¢ a gallon) for the 275,000 gallons of wine sold. The Tax Court reallocated the proceeds from the sale as $275,000 ($1 a gallon) re-

ceived for the wine and the remainder of $75,000 for the winery.

The Tax Court's reallocation increased the tax because it greatly reduced the taxpayer's otherwise deductible loss on the sale of the wine, threw most of the one-half taxable capital gain on the sale of the winery back into ordinary income, and made most of his gain taxable as ordinary income instead of as capital gain. The taxpayer's allocating only $77,000 to the wine—representing the OPA ceiling price of 28¢ a gallon (R. 60, 67)—and $273,000 to the winery plant in the contract of sale (R. 45-46, 66), and thereupon reporting capital gain on the sale of the latter and ordinary income on the former in his and his wife's community income tax returns accordingly (R. 70), greatly reduced their income tax liabilities for the taxable year (R. 70). Only 50% of the greater part of the proceeds ($273,000) attributed to the sale of the winery plant, a capital asset, would thereby be taken into account in computing the long-term capital gain thereon which is taxable under Section 117 (a) (1) and (4), (b) and (c)(2) of the Internal Revenue Code (Appendix, *infra*); and only the relatively small portion of the proceeds ($77,000) attributed to the sale of the wine would be taxable in full amount as ordinary income at the much higher rates under Sections 11, 12 and 22(a) of the Code (Appendix, *infra*). Thus, by the mere expediency of juggling the figures in the contract of sale, with the consent of the purchaser, the taxpayers clearly hoped to be able to avoid many thousands of dollars income taxes. (R. 11-18, 31-33, 70.) On the other hand, it was a matter of utter indifference and wholly immaterial to the purchaser as to how the taxpayer thus allocated the selling prices to the winery and the wine in the contract of sale (R. 77), as Tiara's representative John Dumbra informed the taxpayer antici-

patory to drawing up the contract, "as long as the total price will not exceed $350,000, and the gallonage is correct" (R. 577), as the taxpayer admits (Br. 26, fn. 14). The reason therefor was that so long as the purchaser sold the wine and the winery in the same year, any loss incurred on the resale of the winery would be deductible in full under Section 117(b), and could be offset against the inordinately high profits realizable upon the sale of the wine with the relatively low book cost of 28¢ a gallon. (R. 68, 76.) Hence, the effect would be the same tax-wise for the purchaser regardless of how the taxpayer specified the selling prices of the wine and winery in the contract of sale and/or how they were recorded in the purchaser's books and reported by it for tax purposes.

The facts antecedent to the sale show quite plainly that the transaction was in substance a sale of two classes of property, together, for the lump sum consideration of $350,000. Thus, upon Tiara's first offering to purchase three or four carloads of the taxpayer's wine, the latter declined to sell it alone and insisted upon selling the entire inventory of wine together with the winery plant for a total sum in such amount only. (R. 573-574.) The taxpayer wanted to "make the wine one figure and the plant another figure, but it would be a total price" (R. 577), without any mention of the selling price of wine under the then existing OPA price control regulations (R. 580-581, 583-584). Witness John Dumbra testified that "Mr. Particelli said that he was going to draw up the whole thing together, and the price would be $350,000." (R. 577.) The purchaser's representative failing to get the price down to $330,000 for both wine and winery, as desired by Tiara, agreed to the taxpayer's price of $350,000, and, as pointed out, agreed further that the contract would be drafted to suit the taxpayer's fancy, provided the price did not

exceed the latter amount and there were at least 275,000 gallons of wine available for Tiara. (R. 74, 578). The taxpayer then ascertained that the flat ceiling price for the sale of current dry red wine in bulk was 28¢ a gallon, and thereupon having computed that the 275,000 gallons of wine would come to $77,000 at that price, requested his lawyer to draft the contract of sale accordingly (R. 66-67, 577-578, 623-624)—as the instrument now appears in evidence (R. 45-46, 66). Only a few weeks before the sale to Tiara the taxpayer had been advised by his accountant of the difference between ordinary income and capital gain for tax purposes, and the consequent benefit tax-wise to be derived by selling both the wine and the winery plant together (R. 272-274), as was done here. Tiara did not want the winery but agreed to purchase it because that was the only way it could acquire the wine which it did want. (R. 68, 591-593, 621-622.)

While Tiara entered the wine inventory and winery plant and equipment on its books in accordance with the allocation provisions which the taxpayer, upon Tiara's acquiescence, had inserted in the contract of sale, and used such figures for income tax purposes (R. 57-58, 610-612), it did so merely to follow the written contract of sale, it having been immaterial to it how the total sales price was allocated in the contract of sale between the wine and winery by the taxpayer, as heretofore shown. It is apparent that Tiara did not consider the winery worth any such amount as $273,000 even though thus entered on its books. Victor Dumbra, its president and general manager, having made a mental calculation, when considering the purchase of the winery along with the wine, that it "might be" worth $50,000 to $60,000 (R. 597), and Tiara, unable to get any such offers and therefore having sold it for $20,000 about a year later (R. 69, 76), are proof positive that

it was worth nowhere near such amount, and that Tiara would not have agreed and did not agree to pay any such amount therefor, as the Tax Court found (R. 76). In any event, as the Tax Court found further (R. 76), contrary to the taxpayer's contentions (Br. 28-29), Tiara's book entries showing costs of $77,000 and $273,-000 for the wine and the winery, respectively, are not conclusive—"The books merely follow the written contract of sale", as the Tax Court put it (R. 76). Such entries are "no more than evidential, being neither indispensable nor conclusive" (*Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 187; *Gulf Oil Corp.* v. *Lewellyn,* 248 U. S. 71; they are merely expressions of opinion and only as valuable as other opinions (*Royal Packing Co.* v. *Lucas,* 38 F. 2d 180, 182 (C.A. 9th); and they are only *prima facie* evidence of what they show, and always yield to evidence of the real facts (*Pottash Bros.* v. *Burnet,* 50 F. 2d 317, 319-320 (C.A.D.C.); *Great Northern Ry. Co.* v. *Commissioner,* 40 F. 2d 372 (C.A. 8th), certiorari denied, 282 U. S. 855), such as those here, for example.

In these circumstances, while the negotiations for the sale were arm's length transactions in so far as the determination of the total selling price of $350,000 for both wine and winery were concerned, as pointed out, nevertheless this obviously can not be said of the allocation provisions inserted in the contract of sale at the taxpayer's request. This is particularly true in the light of the consideration that the allocation provisions in the contract are not shown to have served any fundamental or functional purpose in the actual performance of the contract, other than clearly contemplated tax avoidance. Hence, it is abundantly plain, we submit, that the evidence is clear and convincing in impeaching, as *mala fides,* the allocation provisions of the written contract of sale in so far as they affect the income taxes

of the taxpayer, one of the parties thereto, and of his wife's estate. Consequently, the Tax Court, sustaining the Commissioner's determination of allocations in large part, was fully warranted, upon the basis of all the evidence, in making appropriate modified allocations of the proceeds received from the sale as a lump-sum price properly to reflect the consideration paid for each the wine inventory and the winery plant. (R. 77-79.) *Stern* v. *Commissioner,* 137 F. 2d 43, 46 (C.A. 2d); *Deutser* v. *Marlboro Shirt Co.,* 81 F. 2d 139, 142 (C.A. 4th);[5] *Haverty Realty & Investment Co.* v. *Commissioner,* 3 T.C. 161, 167; compare *Lakeside Irr. Co.* v. *Commissioner,* 128 F. 2d 418 (C.A. 5th), certiorari denied, 317 U. S. 666; *M. F. Reddington Co.* v. *Commissioner,* 131 F. 2d 1014 (C.A. 2d); *Morris Investment Corp.* v. *Commissioner,* 156 F. 2d 748 (C.A. 3d), certiorari denied, 329 U. S. 788; *Williams v. McGowan,* 152 F. 2d 570 (C.A. 2d); *Graham Mill & Elevator Co.* v. *Thomas,* 152 F. 2d 564 (C.A. 5th); *Warner Co.* v. *Commissioner,* 11 T. C. 419, 430, affirmed *per curiam,* 181 F. 2d 599 (C.A. 3d) (approving Commissioner's and Tax Court's allocation of principal and interest upon corporation's repurchase of its own bonds (issued at a discount), effecting liquidation, by lump-sum settlement, of its entire indebtedness of principal and interest for less than the face amount.

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[5] Contrary to the taxpayer's contentions (Br. 24-26, 36-38), the court, in the *Deutser-Marlboro Shirt Co.* case, citing many authorities, *q.v.*, held (p. 142) that—

> the recitals of a written instrument as to the consideration received are not conclusive, and it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was. * * *

B. Notwithstanding the Express Language of the Allocation Provisions of the Written Contract of Sale, They Do Not Reflect the Actual Substance of the Agreement and the Intent of the Parties

A consideration of all the facts and circumstances makes it manifest that the sale transaction in fact involved a single, indivisible contract for the sale of both the wine and the winery for the total lump-sum consideration of $350,000, and not a sale of each for a seperate money consideration as claimed by the taxpayer. (R. 70-71.) As pointed out, the allocation provisions of the contract were not only wholly inoperative but served no functional purpose in effecting the sale transaction. Moreover, despite the express language of those provisions the parties themselves cleary did not consider the selling price of the wine to be the bulk selling price of 28¢ a gallon as fixed by the OPA regulations, but rather approximately $1 a gallon as determined by the Tax Court upon the basis of the fair market value thereof. (R. 75-76, 78-79.) A consideration of the terms of the written contract, together with the actions of the parties in negotiating its execution, clearly supports this. Under the performance paragraph of the contract [6] (R. 46, 66), the purchaser promised to pay the entire balance of $345,000 [7] in exchange for the taxpayer's promise to furnish clear title to all the real and personal property promised thereunder.

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[6] The provisions of that paragraph read as follows (R. 46):

> It is further understood and agreed that the balance of said total purchase price for both the said winery and wine, amounting to $345,000.00, will be paid on or before December 21, 1943, at which time said G. Particelli agrees to furnish clear title to said real and personal property.

[7] A down payment of $5,000 had previously been made to the taxpayer. (R. 45, 66.)

Hence, this was the actual undertaking of the parties, unaffected by the allocation provisions, attributing $273,000 to the winery and only $77,000 to the 275,000 gallons of wine sold and inserted in the contract at the insistence of the taxpayer, purporting thus to allocate the total selling price between the two items for no other purpose, in so far as shown, than to anticipate advantageous tax consequences. This, therefore, did not effect a divisible contract in respect of those two items sold for whatever performance was required of the taxpayer, the only performance required by the purchaser in turn was the single act of payment on a date certain of the entire balance ($345,000) due on the contract for both items. The contract was performed substantially in accordance with its terms and the entire balance of the purchase price was paid over to the taxpayer out of the escrow in exchange for the bills of sale for the wine and winery, even though the deed to the latter could not be and was not delivered to the purchaser until some months thereafter when the basic permit therefor was issued by the Treasury Department. (R. 67-68.) This is precisely what the parties had agreed to in order for the taxpayer to get his full selling price of $350,000, and for the purchaser to get the 275,000 gallons of wine, with or without the winery, as plainly indicated by the evidence.

Thus, witness Victor Dumbra, president of Tiara, in reply to the question as to what relative values he placed on the wine and winery in respect of the total figure of $350,000, answered (R. 597), "Well, quite frankly we didn't place an exact value on the plant. We took more into consideration how much wine was in the plant * * * [which by] mental calculation * * * might be worth [only] fifty, sixty thousand dollars for

the plant", without knowing its actual value.[8] This indicated quite clearly that the balance of approximately $300,000 was being paid for the wine alone, regardless of whether or not the purchaser could acquire title to the winery plant. There is nothing to indicate, on the other hand, that the taxpayer would have given the purchaser a bill of sale to the 275,000 gallons of wine upon the latter's payment of $77,000 therefor, as specified in the contract of sale. (R. 46, 66.) On the contrary, it is quite clear that he definitely would not have done so for even though he told John Dumbra, the representative of the purchaser who negotiated the deal for Tiara, that he would state the price of "the wine [at] one figure and the [winery] plant [at] another figure" at "a total price", yet he made it very clear that "he was going to draw up the whole thing together, and the price would be $350,000." (R. 577.) Tiara, through Dumbra, however, never entered into separate agreements with the taxpayer to purchase the wine inventory for $77,000 and/or the winery plant for $273,000 as specified in the contract of sale. (R. 65, 579.)[9] In any event, the taxpayer refused to sell the wine alone for, as he told witness John Dumbra (R. 580-581, 583),

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[8] Witness Victor Dumbra's full answer to the question was as follows (R. 597):

> Well, quite frankly we didn't place an exact value on the plant. We took more into consideration how much wine was in the plant, and then said, well, mental calculation, it might be worth fifty, sixty thousand dollars for the plant. We wouldn't know the exact value, as far as I was concerned.

[9] As against this, the taxpayer had testified that in the negotiations with John Dumbra he had agreed to sell "*all* [his] wine in the winery, lees and everything" at the ceiling price, and that thereafter Dumbra, admiring the winery and as an afterthought, initiated the discussion which resulted in the sale of the $30,000 winery ostensibly for the price of $273,000. (Italics supplied.) (R. 106, 107.)

he could not make a profit on such sale, and therefore insisted that Tiara buy all his wine and the winery together for the express purpose of exempting the sale from the scope of the OPA price control regulations [10] (R. 580-583).

The evidence shows that the parties themselves, notwithstanding the provisions of the contract of sale to the contrary, did not in fact really intend or consider that the selling price of the wine was only $77,000 and the winery $273,000, for the facts show that both parties to the transaction considered that the purchaser was paying from $1 to $1.12 a gallon for the wine, totaling approximately $300,000, and that the balance of the purchase price was paid for the winery, as pointed out, in harmony with the testimony of Victor J. Dumbra, president and general manager of purchaser Tiara.[11]

* * *

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[10] In December, 1943, the taxpayer, after he had entered into the contract of sale with Tiara, told his old friend Alberigi that he had sold 400,000 gallons of wine at $1 a gallon (R. 362), and having sold it for "one dollar a gallon", in order to make it legal under OPA, regulations he had thrown in the winery and good will (R. 75, 360-362).

[11] In this connection, the testimony of Victor J. Dumbra shows the following (R. 623-624):

> Q. * * *. I think you testified a moment ago that so far as you were concerned you regarded *the actual cost of this wine to be approximately $300,000 for the entire batch,* and that the balance of the difference between that and the total figure to be approximately what it was costing you for the winery? [Italics supplied.]
>
> A. I say, that was my mental observation.
>
> Q. Yes.
>
> A. But it didn't reflect that on the books.
>
> Q. You didn't reflect that on the books, and what was the reason you didn't reflect it on the books?
>
> A. The contract is the obvious answer.

(R. 597, 624.) Attempts by the taxpayer's counsel to mitigate the damaging effect of that testimony by pointing out to witness Dumbra that Tiara had entered the wine and winery plant on its books at $77,000 and $273,000, respectively, were abortive for the witness made it clear that the transaction had been handled on its books and tax returns in that way by their accountant Brown merely because they were the figures appearing in the contract of sale, and not as representing the actual cost of the wine and winery, and were entered in the books accordingly by their accountant.[12] (R. 57-58, 610-612.) As pointed out, it was wholly immaterial to Tiara whether or not there was any allocation of the total purchase price between the wine and the winery so long as it sold the wine and the winery in the same year (R. 623), and thereby obtained the benefit of offsetting losses and gains against each other on its tax returns.

Finally, conclusively showing what the parties really considered the wine was actually bought and sold for were the adjustments which they found it necessary to make in their accounts because of the fact that the taxpayer had withdrawn 1,000 gallons of wine from the inventory sold, for his own use some time in December, 1943, before the closing of the escrow. The evidence shows that the adjustment was made for $1,000 in favor of Tiara for the 1,000 gallons of wine withdrawn

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[12] The decision to make these entries in Tiara's books in this way and report them accordingly in its tax returns was made solely by their accountant Brown, Victor J. Dumbra having found out about it only some time later. (R. 610-611.) While, of course, it would have been technically more accurate to have reflected the true costs in the books and tax returns instead of those appearing in the contract of sale, nevertheless it is clear that the procedure followed involved no misfeasance on the part of Tiara. (R. 621-624.)

from that sold by the taxpayer, which obviously was at the rate of $1 a gallon as the fair estimate of the amount paid by Tiara for the same wine under the contract of sale before withdrawn by the taxpayer.[13] (R. 69-70, 75.) As the Tax Court found (R. 75), upon the taxpayer's making settlement with Tiara for its indebtedness to him for services rendered it after the sale (R. 69-70), he agreed to the application of the credit of $1,000 at the rate of $1 a gallon for the 1,000 gallons withdrawn after the sale for his personal use, later testifying, however, that the adjustment was on the basis of the selling price of 28¢ a gallon paid him under the contract of sale, and still later that it was a mistake of his or Tiara's attorneys (R. 75). The Tax Court found instead (R. 75), however, that the parties had agreed that the credit was a fair estimate of the amount paid the taxpayer by Tiara for the wine when purchased. This was fully established by Victor Dumbra's testimony that if Tiara had paid the taxpayer the full amount

[13] The taxpayer apparently sensing the damaging effect of any evidence adduced in respect of this transaction (R. 75), resorted to contradictions and denials, first testifying that he had sold "all" the wine and "everything" he had in the winery, specifically, that "I sold everything I have in the winery" (R. 106, 132); later admitting, upon being pinned down, that he had taken out about 1,000 gallons, and when asked what adjustment had been made therefor, he stated that the adjustment was at the same price he had received for the wine, namely, the ostensible ceiling price of 28¢ a gallon (R. 132). Upon the Commissioner's introducing documentary evidence establishing that the adjustment for the 1,000 gallons was $1,000 (R. 601), the taxpayer testified upon redirect examination that the 1,000 gallons of wine he had withdrawn was some very high quality Italian Swiss Colony Wine (R. 200, 214-217). In so testifying, however, he had forgotten that he had previously testified in substance that all the wine involved in the sale was wine of his own making (R. 99, 132), as corroborated by the oral stipulation of the parties during the proceedings in the Tax Court (R. 153).

($1,500) owed him for his services (R. 69-70), "we would have expected $1,000 back in cash [for the wine withdrawn], definitely" (R. 601). In these circumstances, it is apparent that the self-serving allocation provisions of the written contract of sale were not only entirely inoperative and of no effect in the performance of the contract but also were wholly at variance with the actual substance of the transaction, the contract, contrary to the taxpayer's contentions (R. 70-71), clearly having been an indivisible one involving the sale of all the taxpayer's wine and the winery, together, for the total lump-sum price of $350,000, the allocation provisions of the contract, obviously designed primarily to advantage the taxpayer tax-wise and serving no functional purpose in the transaction, to the contrary notwithstanding. These considerations clearly show that the parties' allocation provisions in the sales contract were not arm's length but were designed merely as a matter of expediency for the taxpayer's benefit tax-wise; hence, the Tax Court was fully warranted in finding and concluding, upon all the evidence, that the wine was sold for $1 a gallon, or $275,000, and the remainder of $75,000 represented the selling price of the winery. (R. 70, 79.)

C. The Tax Court Properly Allocated the Total Selling Price Between the Wine and the Winery, Based on the Finding of the Actual Fair Market Value of the Wine at the Time of the Sale.

The Tax Court based its allocation of the total selling price to the wine and the winery primarily on the actual intent of the parties—as distinguished from the self-serving and wholly inoperative allocation provisions set forth at the taxpayer's request in the contract of sale — and, in substance, determined that the parties really *intended* to sell the wine and winery for the respective fair market values thereof as determined by

it upon a consideration of all the evidence, facts and circumstances. (R. 72-79.) Since the taxpayer successfully avoided the 28¢ OPA price ceiling by selling his wine and winery together here for a lump-sum price (R. 63, 72-73), as he had done in other instances without selling the winery (R. 61, 75, 168-171, 192-193, 358-359), and the evidence shows that the fair market value of ordinary current, dry, red wines to vintners to the trade under this permissible method was estimated and shown by the Commissioner's several witnesses to have been from 75¢ to $1.25 a gallon (R. 78-79, 315-317, 340-341, 352, 458-459, 600-601, 612), the record thus establishes the fact that, notwithstanding the attempted OPA price control, there was a free open market for the legitimate disposition of the vintners' wine to trade channels at the net rate of at least $1 a gallon to the vintner during all times material here.

Thus, witness Victor J. Dumbra, president and general manager of Tiara which bought the taxpayer's wine in question, testified that his company was actually paying $1 to $1.12 a gallon for the taxpayer's 275,000 gallons of wine—and the Tax Court so found (R. 68)—and that the winery was worth only about $40,000 to $60,000 (R. 79, 600-601, 612). Other witnesses (Mondavi and Gomberg) testified that the wine was worth $1 a gallon, and 75¢ to $1.25 a gallon, respectively. (R. 78-79, 315-317, 340-341, 352, 458-459.) Indeed, as pointed out, the taxpayer himself paid $1 a gallon for the 1,000 gallons of the same wine withdrawn from the inventory after the sale of *all* his wine had been made to Tiara. (R. 69-70, 75, 79, 601.) And only six months before the taxpayer's sale of all his wine to Tiara, the taxpayer had, contrary to the OPA price control reguations, sold more than 60,000 gallons of wine to the Sunset Winery of Ohio at a price somewhere between

70¢ and $1 a gallon.[14] (R. 168-171, 192-193.) Moreover, Tiara, upon offering the winery for sale for $60,000,

[14] The taxpayer contends, incongruously, that the Tax Court's admitting in evidence, over his objections, testimony in respect of a crime of which he had never been convicted—taxpayer's sale of about 60,000 gallons of wine, over the OPA ceiling price of about 27½¢ a gallon, at approximately 86¢ a gallon during the same period involved here (R. 61; Br. 14)—was error warranting reversal of its decisions here (Br. 12-19). This contention is clearly without merit for the record plainly shows that the Tax Court admitted such evidence (R. 530-531), over the taxpayer's objections (R. 523-528), as adduced by the Commissioner (R. 521-523, 529-531), not for the purpose of laying a foundation for the taxpayer's prosecution (R. 524, 528), as feared by the taxpayer (R. 524-525, 527-528)—the OPA penal statutes having already expired (R. 524)—but solely to rebut the taxpayer's testimony that he had never sold wine over the established OPA ceiling prices (R. 523, 526-527), and it made a finding in respect thereto accordingly (R. 61). This evidence was brought out by the Commissioner merely for the purpose of showing, collaterally (R. 526-527), that the taxpayer, of his own admission, had made other sales of wine over the established ceiling prices during the period involved here (R. 524, 526-527), and therefore showing in turn the disingenuousness and unreliability of his claim of the sale here of his 275,000 gallons of wine purportedly at the prevailing OPA ceiling price of 28¢ a gallon during the same period (R. 45-46, 66). It will be noted that the Tax Court, other than making a finding in respect to the illicit sale of 60,000 gallons (R. 61), and taking cognizance thereof along with other testimony as showing "all of the conflicting evidence" which it considered unworthy of detailed discussion (R. 72), never even considered the testimony objected to here in arriving at its decisions (R. 70-79). On the other hand, it did take cognizance of witness Aberigi's testimony (R. 358-359) of the taxpayer's other sale, made over the objections of his daughter, of 100,000 gallons of wine at 70¢ a gallon (R. 75). Hence, in the absence of any showing or indication that the Tax Court's decisions would not have been the same without such evidence, it is abundantly clear, we submit, that there was no harm done by its admission in evidence and, consequently, that there is no valid basis for the taxpayer's objections thereto.

shortly after having acquired title to the property in May or June of 1944 ostensibly for $273,000 (R. 45-46, 66), first rejected offers of $40,000 and $45,000, would have accepted $50,000 or $60,000, and finally sold it for $20,000 in December, 1944 (R. 69, 76). This, we submit, shows conclusively that Tiara did not really pay $273,000 for the winery and only $77,000 for the wine, as the taxpayers contend and the contract of sale purports to show (R. 45-46, 66), but that it was *in fact* the other way around, that is, it actually paid, at most, $75,000 for the winery and $275,000 for the wine on the basis of $1 a gallon fair market value, as the Tax Court found upon *all* the evidence, facts and circumstances (R. 70), and held accordingly (R. 79).

The taxpayers urge further that it was error for the Tax Court to assign a price higher than the prevailing OPA ceiling price to the wine because the fair market value thereof purportedly could not exceed its ceiling price. (Br. 43-55.) The short answer to that is, as pointed out, that while the fixed price ceiling of 28¢ a gallon obtained if the wine were sold by itself, yet when sold along with the winery plant, as here, there was admittedly no price ceiling restriction on the sale of the wine. (R. 63.) The taxpayers argue further (Br. 43-55), as in the Tax Court (R. 78), that if the fair market value is used as the basis, then no more than $77,000 could be ascribed to the wine since that represented the maximum ceiling price, reasoning that if the Government had requisitioned the wine in December, 1943, it would have paid the taxpayer only 28¢ a gallon for it, as the fair market value of the property, as compensation therefor, citing *United States* v. *Commodities Corp.*, 339 U. S. 121, and *United States* v. *Felin & Co.*, 334 U. S. 624, in support thereof (Br. 49-53). The Tax Court clearly distinguished those cases as having no factual basis for application here. (R. 78.) In

any event, the Supreme Court merely decided in those cases that the ceiling price for the particular property under consideration there constituted lawful just compensation to the owners, but the Court had no occasion to determine and made no determination at all that the ceiling price constituted the fair market value under the unusual facts of those cases. Here the ceiling price was substantially less than the cost, and therefore it may not be presumed, under the particular facts here, that the ceiling price of 28¢ a gallon would under any circumstances be determined to be just compensation in the event of requisition by the Government but rather, quite clearly, the fair market value of the wine then prevailing in the free market, as the Tax Court determined. (R. 78-79.) Consequently, the authorities relied on by the taxpayers do not support the proposition that the fair market value of vintners' wine in December, 1943, must be determined to be not more than the then-existing ceiling price of 28¢ a gallon.

In view of the foregoing, we submit that the evidence clearly establishes that the Tax Court's allocation of $275,000 of the total proceeds of the sale to the wine on the basis of $1 a gallon fair market value, and the remainder of $75,000 representing the selling price of the winery plant and equipment (R. 70, 79), is clearly correct, being based on the established fair market value of the wine in the free market shown to be actually existing at the time of the sale. It follows that the Commissioner and the Tax Court were not bound by the allocation provisions of the taxpayer's written contract of sale inasmuch as it fails to reflect the actual substance of the sale transaction and the intent of the parties thereto, the clear and convincing proof showing very plainly the *mala fides* of the contract in so far as it affects the income tax liability of the taxpayer, one of the parties thereto, as well as his wife's estate, a

party petitioner here. Cf. *Commissioner* v. *Court Holding Co.,* 324 U. S. 331, 333-334; *United States* v. *Cumberland Pub. Serv. Co.,* 338, U. S. 451, 454, 456; *Weiss* v. *Stearn,* 265 U. S. 242, 253, 254.

CONCLUSION

The decisions of the Tax Court are in all respects correct, and should therefore be affirmed by this Court.

Respectfully submitted,

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APRIL, 1953.

APPENDIX

Internal Revenue Code:

SEC. 11 [As amended by Sec. 102, Revenue Act of 1942, c. 619, 56 Stat. 798]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 6 per centum of the amount of the net income in excess of the credits against net income provided in section 25. * * *
(26 U.S.C. 1946 ed., Sec. 11.)

SEC. 12. SURTAX ON INDIVIDUALS.

(a) *Definition of "Surtax Net Income".*—As used in this section the term "surtax net income" means the amount of the net income in excess of the credits against net income provided in section 25 (b).

(b) [As amended by Sec. 103, Revenue Act of 1942, *supra*] *Rates of Surtax.*—There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual the surtax shown in the following table:

* * * * *

[Here follow the rates of surtaxes, ranging from 13% on amounts of ordinary income not over $2,000, to $139,140, plus 82% of excess over $200,000.]

* * * * *

(26U.S.C. 1946 ed., Sec. 12.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, voca-

tions, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [As amended by Sec. 115 (b), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151 (a), Revenue Act of 1942, *supra*] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), * * *, or real property used in the trade or business of the taxpayer;

* * * * *

(4) [As amended by Sec. 150 (a), Revenue Act of 1942, *supra*] *Long-term capital gain.* The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(b) [As amended by Sec. 150 (c), Revenue Act of 1942, *supra*] *Percentage Taken Into Account.* In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

(c) [As amended by Sec. 150 (c), Revenue Act of 1942, *supra*] *Alternative Taxes.*—

(c) [As amended by Sec. 150 (c), Revenue Act of 1942, *supra*] *Alternative Taxes.*—

* * * * *

(2) *Other taxpayers.*—If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, there shall be levied, collected, and paid, in lieu of the tax imposed by sections 11 and 12, a tax determined as follows, if and only if such tax is less than the tax imposed by such sections:

A partial tax shall first be computed upon the net income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and the total tax shall be the partial tax plus 50 per centum of such excess.

* * * * *

(26 U.S.C. 1946 ed., Sec. 117.)

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No. 13,503

IN THE

United States Court of Appeals

For the Ninth Circuit

GIULIO PARTICELLI,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ESTATE OF ELETTA PARTICELLI, Deceased,
Arthur Guerrazzi, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Review of The Tax Court of the United States.

PETITIONERS' REPLY BRIEF.

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Subject Index

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Respondent.

On Review of The Tax Court of the United States.

PETITIONERS' REPLY BRIEF.

I. THE TAX COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE TENDING TO SHOW THAT PETITIONER HAD PREVIOUSLY COMMITTED A CRIME.

In the most oblique fashion possible, respondent seems to admit error in the admission over petitioner's objection of evidence tending to establish that petitioner had pre-

viously committed a crime in selling wine at over-ceiling prices. As we demonstrated in our opening brief (pp. 16-17), if petitioner is understood to have testified that he at no time sold at over-ceiling prices he did so on cross-examination, and in that event respondent is bound by his testimony and it was error to permit him to impeach it. In his brief (p. 38, footn.), respondent states that the evidence to which we objected was offered "solely to rebut the taxpayer's testimony that he had never sold wine over the established OPA ceiling price." Since respondent cites no record reference to show that petitioner so testified on direct, and at the trial respondent's counsel admitted that if there was such testimony it was elicited on cross-examination (R. 527), he must mean to defend the ruling below on that factual assumption. Since under the cases his position cannot be defended (Pet. Op. Br. 15, 16-17), we do not see that any serious defense is offered.

Furthermore, respondent apparently seeks to create the impression that petitioner mistakenly objected to this evidence below on the ground it would open petitioner to criminal prosecution.[1] In the court below, respondent's counsel first thought when the objection was made that petitioner was claiming privilege against self-incrimination (R. 524), and candidly stated that his purpose was to impeach petitioner by proof of a crime (R. 524). Petitioner then objected to the offer for that or any purpose

[1] "not for the purpose of laying a foundation for the taxpayer's prosecution (R. 524, 528), as feared by the taxpayer (R. 524-525, 527-528)" (Resp. Br. 38, footn.).

(R. 525, 528).[2] Accordingly, the objection was properly preserved below.

Respondent also stated that "by his own admission" petitioner had made overceiling sales (Resp. Br. 38, footn.). This careless statement is entirely untrue. The record references cited by respondent are to the argument below of respondent's counsel, and not to testimony or other evidence. Respondent cannot point to evidence of such admissions, for there are none. See Petitioners' Opening Brief, p. 13, footnote.

Finally, and here respondent comes to the real point of his defense of the action below, respondent argues that no harm resulted from the error below, because the trial judge did not expressly admit that his refusal to credit petitioner was attributable to this impeaching evidence. This is not an acceptable defense. Prejudicial error cannot be permitted to go uncorrected merely because the trier of the facts refrained from admitting that he was prejudiced by it.

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[2]Petitioner's counsel stated the objection in this way (R. 525): "if (this document) did prove what he is trying to prove it would, I repeat, be an effort to prove him guilty of a crime and thereby impeach his testimony."

Again, at R. 528: "Mr. Brookes: May I illustrate my point with a hypothetical case. Counsel might very well ask a question of a witness whether he had ever committed arson, and then an answer would naturally come out no, and then in this manner he would attempt to prove he had committed arson."

II. THE WRITTEN CONTRACT WAS NOT A SHAM AND PETITIONERS' TAX LIABILITY SHOULD BE DETERMINED ON THE BASIS OF ITS TERMS.

Respondent's position here is based on a series of contentions which can be speedily answered.

1. The contention that *Commissioner v. Court Holding Co.,* (1945) 324 U.S. 331, authorizes respondent to impose taxes on the basis of a psychoanalysis of the parties to a contract instead of on the basis of the terms of the contract[3] has been answered by our discussion at pages 38 to 42 of our opening brief. Essentially the same broad contention respondent makes here has recently been presented to and rejected by this Court in *Twin Oaks Co. v. Commissioner,* (CA 9, 1950) 183 F. 2d 385, and *Hypotheek Land Co. v. Commissioner,* (CA 9, 1953) 200 F. 2d 390.

2. This case has provided respondent with another opportunity to urge his favorite contentions: (a) what the taxpayer did was prompted by tax saving considerations; (b) any action so motivated cannot be given effect. Both contentions are baseless.

(a) To argue on this record that the contract took the form it did in order to reduce petitioner's taxes is ridiculous. The Tax Court did not so find, and we suggest that the Tax Court would not have neglected to make such a finding had it thought the evidence would have supported it. The record is replete with the evidence of what motivated the parties—desire to conform to what

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[3]Respondent does attempt an argument based on the terms of the contract. At p. 30 of his brief he attempts to convert the "time clause" in the contract into the contract itself. Extended argument is not needed to establish that a clause fixing time for performance does not override the allocation clauses in a contract.

they understood were the regulations of the Office of Price Administration. The only record references respondent cites for his assertion that petitioner caused the contract to take the form it did in order to reduce his taxes are pp. 272-274 (Resp. Br. 27). These references are to the cross-examination of Mr. George E. Oefinger, C.P.A., a partner in the noted national accounting firm of Arthur Andersen & Co. (R. 277). Previously Mr. Oefinger had testified that he had advised petitioner that he must observe the ceiling price in this sale and that he could not sell the wine for a price in excess of 28 cents a gallon (R. 264, 265). Mr. Oefinger's testimony is well summarized in his own words (R. 264-265):

> "A. Well, his primary concern was about the sale of the wine. In other words, he realized, as I had told him before and I think he knew of his own knowledge, that there was a ceiling price that had been established by the OPA on the sale of wine, and he knew because I had so informed him that if any wine was sold in bulk in excess of that—of that ceiling price, he was subject to penalties which might go as high as three times the difference between the price at which it might be sold and the ceiling price.
>
> "Q. When he brought these parties to your office, did he consult you then about the ceiling price?
>
> "A. Yes, he did. As a matter of fact, he asked me to make a determination as to what the ceiling price would be in this particular instance, which I proceeded to do.
>
> "Q. What did you tell him was the ceiling price?
>
> "A. I told him after I completed the computation. I told him in my judgment the ceiling price for that wine was not in excess of 28 cents a gallon."

Since this testimony, unless rebutted or shaken, would completely eliminate any serious contention that tax-saving motives dictated the form of the contract, respondent's trial counsel on cross-examination tried to, but could not, shake Mr. Oefinger. The witness admitted that he had advised petitioner of the tax consequences of the transaction (R. 274), but adhered to his previous testimony that the 28-cent a gallon price for the wine was used because it was the ceiling price (R. 274-276). He even produced his work papers on which he had, at the time, made his calculations of the ceiling price (R. 274-275).

Elsewhere in the brief (Resp. Br. 22) respondent states that the "obvious reason" the figures were "juggled" to be consistent with the ceiling price on wine was for tax avoidance. We submit such a statement does not rise to the dignity of argument. The Court cannot, and should not be asked to, take judicial notice that all transactions are framed for tax avoidance. In the absence of supporting evidence, as in the case here, that is precisely what respondent is asking this Court to do.

(b) Transactions beween unrelated parties, dealing at arm's length, cannot be set aside merely because motivated in part by tax avoidance. Only if the contract is sham may it be ignored. *U. S. v. Cumberland Public Service Co.,* (1950) 338 U.S. 451; *Goold v. Commissioner,* (CA 9, 1950) 182 F. 2d 573, 575; *Twin Oaks Co. v. Commissioner,* (CA 9, 1950) 183 F. 2d 385; *Hypotheek Land Co. v. Commissioner,* (CA 9, 1953) 200 F. 2d 390.

Accordingly, the tax avoidance motive, even if shown by the evidence to exist, would not support the decision below.

3. (a) Apparently respondent recognizes that there is too much conduct consistent with the terms of the contract for him to be able to argue successfully that the contract was a sham. Accordingly he argues that the price allocation in it can be disregarded because, unlike the rest of the contract, it was "self-serving" (Resp. Br. 16). He specifically admits (Resp. Br. 28) that the negotiations were at arm's length so far as the total price was concerned, but contends that the allocation provisions in this arm's length contract were "self-serving," notwithstanding they were signed and agreed to by the unrelated, independent purchaser.

The conception is a startling one. It is an admission that respondent contends he has an inherent power (no statutory provision is relied on to confer it) to analyze every arm's length sale to see if both sides have an equal interest in every detail of it and if they have not, he can substitute his terms for those of the parties. The newspapers have recently carried stories of the sale, subject to stockholders' approval, of all the assets of Willys-Overland Motors, Inc. to Kaiser-Fraser Corporation. Apparently respondent conceives his powers to be such that if he can find that Kaiser-Fraser Corporation did not want to buy all the Willys assets but had to take all in order to acquire those it wanted, the Commissioner of Internal Revenue can rewrite the contract to substitute his own allocation of the total price to different assets for

the allocation made by the parties. Is it not abundantly clear (1) that this is a new power for which respondent is grasping, and (2) if he can do what he is seeking to do here he can do it in the Willys-Kaiser-Fraser case?

And while we are on the subject of actions motivated only by tax considerations, does anyone suppose respondent's allocation, if he is free to make it, will be *free* of tax considerations?

(b) In any event, assuming respondent can divide an arm's length contract into "arm's length" portions and "self-serving" portions, his contention that Tiara had no interest in the allocation is unrealistic and contrary to demonstrable fact.

Tiara entered the wine cost on its books at $77,000. Because it used this figure as the cost of the wine, if Tiara sold the wine for $2.00 a gallon net to it,[4] there would be a taxable profit of $1.72 a gallon. Since the World War II excess profits tax reached a rate of 90%, Tiara could be liable for income and excess profits taxes of $1.55 on each gallon sold. This tax, respondent says, was of no significance to Tiara, so it willingly agreed to the 28-cent allocation as a favor to petitioner.

In cognizance of the fact that it is obvious that this tax would be important to anyone, including Tiara, respondent's theory proceeds from here: respondent says that this tax was unimportant to Tiara because by selling the winery Tiara could establish a tax loss under Sec. 117(b) [Resp. Br. 26, 44]. Since Sec. 117(b) provides

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[4]Victor Dumbra testified Tiara could get this price by bottling the wine (R. 599-600, 620).

for capital losses, which corporations cannot deduct from ordinary business income, we do not see where Sec. 117(b) could have been helpful to Tiara.

In any event, we submit that respondent's theory why the contract figures made no difference to Tiara is far-fetched and artificial. Respondent's theory places Tiara in the position where it had to sell the winery in 1944 in order to establish a loss to offset its wine profit.[5] We find it impossible to believe that Tiara or any other buyer would *lightly* place itself in such a position. To contract itself deliberately into a position where it had to make a forced sale of the winery in 1944 to establish a tax loss was a serious matter indeed, and not, as respondent urges, a thing of indifference to Tiara.

4. (a) Respondent seeks to support the trial court's failure to give effect to petitioner's testimony that the 1,000 gallons of wine petitioner retained were high-grade wine and not wine of his own manufacture by pointing to cases involving the power of the trier of the fact to reject contradicted or improbable testimony. This testimony was, however, not contradicted by anything in the record: it may be noted that respondent's trial counsel did not even try to contradict it. For instance, the Dumbra brothers, who were respondent's witnesses, were

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[5]This assumes Tiara intended when it bought the winery to sell it in 1944. This assumption is factually incorrect. Tiara would have retained the winery and used it but for the then unforeseen fact that subsequently Tiara bought a larger and better equipped winery. Victor Dumbra specifically so testified. (R. 602, 605.) After all, this is the winery in which petitioner made this wine on which respondent contends he made a profit of 50 cents a gallon, a 100 per cent profit!

not examined about the character of this wine, and since they were his witnesses respondent's trial counsel may be presumed to have known what their testimony on this point would have been had they been asked for any. Petitioner's testimony is also not improbable. He regularly sold, in his retail store, wine purchased from better vintners than he, including Italian Swiss Colony, to whom he attributed the wine under discussion. It is not improbable that he had some on hand, and any vintner would have known enough to reserve it instead of petitioner's own vintage which, being but partially finished, would not keep. The importance of the wine's ability to keep is shown by the fact that when this case was tried, over six year after the fact, petitioner still had some of the wine on hand. (R. 217, cf. R. 132.)

Respondent seeks to find a contradiction in the fact that petitioner elsewhere testified that all the wine sold to Tiara was of his own vintage. There is no contradiction here. It was understood by the parties when the sale was made that petitioner was to retain this wine, not sell it to Tiara. Petitioner so testified (R. 132):

> "* * * I reserved the right to take some wine when I sold the winery and wine to Mr. Dumbra."

Respondent's own evidence (Exhibit L) is to the same effect. It says, in part (see Pet. Op. Br. p. 31):

> "You will recall that 1,000 gallons were withdrawn by Mr. Particelli *prior to the closing of the deal* and that *the whole deal amounted to 274,000 gallons,* with an adjustment to be made by Particelli in connection with the 1,000 gallons." (Emphasis ours.)

Accordingly, the 274,000 gallons actually sold were of petitioner's own vintage, and testimony to that effect does not contradict his further testimony that the 1,000 gallons not intended to be sold to Tiara were Italian Swiss Colony wine.

(b) Respondent also relies (Resp. Br. 33, footn. 10) on testimony of one Alberigi that petitioner had told him that he had sold 400,000 gallons of wine for $1 a gallon and had thrown the winery in to make it legal. The real significance of Alberigi's testimony is its contradiction of petitioner's tax avoidance theory.

Petitioner's statement to Alberigi, if actually made,[6] was such plain braggadocio that it is incredible to us that anyone should be asked to believe it in preference to testimony given under oath. Moreover, on its face this braggadocio was false. Petitioner did not sell 400,000 gallons of wine. He did not give the winery away for nothing. He did not receive $400,000 for anything. Even respondent has never allocated the entire consideration to the wine, or based his deficiency on a $400,000 sales price. Of what probative effect, then, is the remaining portion of this hearsay, to the effect that petitioner sold his wine for $1 a gallon? None, we submit. It was merely the idle crackerbarrel chatter of a vintner understandably unwilling to admit, when not under oath, that he had been forced by the ceiling prices to sell his wine for less than his grape costs.

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[6]Which petitioner did not recall having made and did not believe he had made (R. 373). Again, however, the trial court discredited petitioner and found the statement was made. This is further proof of the seriousness of the improperly received impeaching evidence.

(c) No argument we have made is made in reliance on any evidence which is contradicted by anything in the record. Our arguments for reversal are based entirely on uncontradicted evidence and the findings of the Tax Court. Accordingly, we ask nothing of this Court which it may not properly accord us under the cases cited by respondent.

III. THE MARKET VALUE OF THE WINE DID NOT EXCEED 28 CENTS A GALLON, AND IT WAS ERROR TO ALLOCATE A HIGHER PRICE TO IT.

Respondent has evidently been unable to answer our point (Pet. Op. Br. 45) that the expert witnesses' testimony of value[7] was based solely on franchise bottling sales, a type of grey market of which the parties here had no knowledge. In any event, respondent has not attempted to answer it.

Neither has respondent replied to our contention (Pet. Op. Br. 53-54) that petitioner's sale was subject to the ceiling because, to avoid it, there must have been a sale of the entire business, which here there was not. Instead, respondent has said (Resp. Br. 39) that "admittedly" there was no ceiling applicable to the sale. We suppose respondent means that *he* "admits" it, for our opening brief made it abundantly clear that we do not. Instead,

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[7]Respondent has erroneously (Resp. Br. 37) stated that the range of value they testified to was 75¢ to $1.25 a gallon. The record references respondent cites show that Mondavi testified that the value ranged from 75¢ to $1.00 a gallon, and Gomberg valued the wine at $1.00 a gallon. While Gomberg said there had been some franchise bottling sales at $1.25 a gallon (R. 459), his opinion valued the wine at $1.00 a gallon (R. 458).

we have shown, we submit, that this sale was not within the narrow exemption the OPA rulings opened up.

Perhaps our advocacy has distorted our perspective, but we believe this case presents a strange spectacle! Here the Government, through its Department of Justice, is in court arguing that its seriously meant and earnestly executed efforts to impose wartime price ceilings on goods were so ineffective that there was, to quote, "a free open market"[8] in wine, which established the fair market value of the wine in preference to its ceiling price. If the Government displays such a cynical view of its laws and regulations, how can citizens do otherwise? We wonder if victory in a tax case should be won by such measures, and if it can be worth the price.

Furthermore, respondent's discussion of the effect of ceiling prices on market values proceeds as if he had read neither our brief nor the cases on the point. Thus, after referring to the Supreme Court cases on the point, he asserts (Resp. Br. 40):

> "* * * the Court had no occasion to determine and made no determination at all that the ceiling price constituted the fair market value under the unusual facts of those cases."

This is respondent's statement. But the Supreme Court said (*United States v. Commodities Trading Corp.* (1950) 339 U.S. 121, 124):

> "Thus ceiling prices of commodities held for sale represented not only *market value* but in fact the only value that could be realized by *most* owners.

[8]Resp. Br. 37; semble, Resp. Br. 24.

> Under these circumstances they cannot properly be ignored in deciding what is just compensation." (Emphasis added.)[9]

Again, in the same opinion, the Supreme Court said (339 U.S. 129):

> "* * * *The general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price.* (Citation omitted.) The reasons underlying the rule in cases where no Government-controlled prices are involved also support its application *where value is measured by a ceiling price.*" (Emphasis added.)[10]

The foregoing quotations need no explanation. They need only to be read. They establish that the Supreme Court has indeed held that ceiling prices establish the fair market value.

Respondent also argues (Resp. Br. 40):

> "Here the ceiling price was substantially less than the cost, and therefore it may not be presumed, under the particular facts here, that the ceiling price of 28¢ a gallon would under any circumstances be determined to be just compensation in the event of requisition by the Government * * *."

The Supreme Court has held to the complete contrary of what respondent argues. Accepting the contentions of the Solicitor General, that Court has held that even where

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[9]Quoted at p. 51, Petitioners' Opening Brief.
[10]Quoted at p. 52, Petitioners' Opening Brief.

it was less than cost to the owner, ceiling price fixed the condemnation price. In the *Commodities Trading* case, the Supreme Court said (339 U.S. at 129):

> "Another contention is that the particular pepper turned over to the Government cost Commodities more than the ceiling price, and that this is a special circumstance sufficient to preclude use of the ceiling price here. * * * we think that the cost of the pepper delivered provides no sufficient basis for specially excluding Commodities from application of the ceiling price."[11]

The Supreme Court held that pepper which cost the citizen 12.7 cents a pound could be requisitioned by the United States for 6.63 cents a pound solely because the latter was the ceiling price. All this we previously stated in our opening brief at pp. 50-52. It is obvious that the 50 cents a gallon cost of petitioner's wine would have been accorded no more significance than the 12.7 cents a pound cost of Commodities' pepper, and we suggest that respondent would have shown this Court the respect due it had he candidly admitted that this point is a settled one and is not open for debate.

CONCLUSION.

The crux of respondent's case is his complaint that petitioner sold his wine at the ceiling price. Entirely apart from the questions of public policy raised by such a complaint's emanating from an agency of the Govern-

[11]Quoted at p. 52, Petitioners' Opening Brief.

ment, we submit that respondent has actually confused his real complaint. He is really complaining because petitioner sold his winery for $273,000. Petitioner could not lawfully have sold his wine for more than $77,000, and had he sold only his wine he would have reported a loss for the year 1943 and paid no tax at all. As it is, he made a large capital gain and paid a large tax solely because he was able to and did sell his winery for a large profit. Thus the fisc benefited from petitioner's sale of his winery; it received more taxes than if petitioner had sold his wine at ceiling and retained his winery. We submit respondent should not be heard to complain.

For the error at the trial, a new trial is the only remedy if respondent has sufficient case on the merits to warrant the expense of a retrial. We submit respondent has not. The judgment below should be reversed and judgment entered for petitioners on the points raised in this appeal.

Dated, San Francisco, California,
April 17, 1953.

Respectfully submitted,
VALENTINE BROOKES,
ARTHUR H. KENT,
Attorneys for Petitioners.

No. 13509

United States Court of Appeals

for the Ninth Circuit.

ALBERT J. CYR and WARREN H. PILLSBURY, Deputy Labor Commissioners, United States Department of Labor,

Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-7-52

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern District of California, Southern Division

No. 1270-Civ.

CRESCENT WHARF & WAREHOUSE COMPANY, a Corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Complainants,

vs.

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Defendants.

COMPLAINT FOR INJUNCTION

Complainants complain of the defendants as follows:

I.

That at all times herein mentioned the complainants, Crescent Wharf & Warehouse Company and Pacific Employers Insurance Company, were corporations, duly organized and existing by virtue of the laws of the State of California.

II.

That at all times herein mentioned Warren H. Pillsbury and Albert J. Cyr were Deputy Commissioners of the United States Department of Labor,

Bureau of Employees' Compensation, 13th Compensation District, and administrators of the Longshoremen's [2*] and Harbor Workers' Compensation Act, Title 33, U.S.C.A. Section 901 to 950, inclusive.

III.

That the defendant, William Lasche, is the person in whose favor an order and an award of compensation hereinafter described was made on the 17th day of May, 1951; that said William Lasche is now, and was at all times herein mentioned, a resident of the County of San Diego, State of California.

IV.

That said William Lasche alleged in the claim filed by him with the said Bureau of Employees' Compensation against the complainants herein that said William Lasche was, on the 5th day of September, 1950, employed by said Crescent Wharf & Warehouse Company and that he sustained an injury on the said day arising out of and occurring in the course of his alleged employment, which allegations Crescent Wharf & Warehouse Company denied.

V.

That at all times herein mentioned the complainant, Pacific Employers Insurance Company, had in effect a policy insuring said Crescent Wharf & Warehouse Company against its liability under the said Longshoremen's and Harbor Workers' Compensation Act.

***Page numbering appearing at foot of page of original Certified**

VI.

That the said William Lasche filed a claim against these complainants with said Bureau of Employees' Compensation for the benefits provided in said Longshoremen's and Harbor Workers' Compensation Act and thereafter a hearing was held on the 4th day of April, 1951.

VII.

That on the 17th day of May, 1951, defendant Albert J. Cyr, acting in his capacity as Deputy Commissioner for said United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, made a compensation order and award of [3] compensation. That a true copy of said order and award of compensation is attached hereto and made a part hereof and referred to as "Exhibit A."

VIII.

That defendant Warren H. Pillsbury is a Deputy Commissioner in the United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District; that complainants are informed and believe and therefore allege that the said Warren H. Pillsbury is the Deputy Commissioner in charge of the area including the State of California and that said compensation order and award of compensation was made at his direction or under his supervision and issued out of his office and for that reason said Warren H. Pillsbury has been made a defendant in this proceeding.

IX.

That complainants have no adequate nor other remedy except by this proceeding which is brought pursuant to Section 921 of the said Longshoremen's and Harbor Workers' Compensation Act, which provides that if not in accordance with law, a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party interested against the Deputy Commissioner making the order and instituted in the Federal Court for the judicial district in which said injury occurred. Said injury occurred in the County of San Diego, State of California, and is in the judicial district of this Court.

X.

That at said hearing held April 4, 1951, defendant William Lasche testified that on September 5, 1950, while performing services for complainant Crescent Wharf & Warehouse Company, a Corporation, and while getting down from a hatch of about three feet in height, he felt a jar in his left heel. That said alleged injury occurred at about 7:30 to 8:00 p.m. of said [4] September 5, 1950. That he continued to work the balance of his shift but was noticed limping by one of his fellow employees. That the day after the alleged injury there was no work available but that he worked in his regular employment the second day following said alleged injury and continued to work for a period of eight to nine days thereafter. That nine or ten days after the alleged injury he sought the services of F. Bruce

Kimball, M.D., a physician of his own choice. Massage treatment was given and X-ray photographs taken of the left hip, knee and leg of said defendant William Lasche. That said X-rays disclosed no fracture, the condition of his left leg did not improve and that he voluntarily ceased being treated by Dr. Kimball and sought the services of Wilfred M. Knudtson, D.O. That Dr. Knudtson caused further X-ray photographs to be taken of his left leg and reported no fractures but did state his left leg was somewhat longer than his right. That he was wholly unable to work from September 5, 1950, to and including November 6, 1950. That on November 6, 1950, while going up a step ladder at his home he twisted his body, his left leg gave away and shortly thereafter, upon being medically examined, he was found to be suffering from a fracture of the neck of the left femur. Said defendant William Lasche further testified that he had been wholly unable to work from said November 6, 1950, to and including the date of the hearing.

Medical reports filed at said hearing state that no fractures of any kind were found prior to November 6, 1950.

XI.

That the act of the Deputy Commissioner Albert J. Cyr in making said alleged compensation order and award of compensation of May 17, 1951, is not in accordance with the law wherein it is found as a finding of fact, "That because of the instability of the left leg, this second injury is directly attribu-

table to [5] the injury of September 6, 1950." That pursuant to said finding of fact the said Deputy Commissioner made an award in favor of said defendant William Lasche as follows:

"Forthwith $805.00 representing compensation benefits accruing to April 4, 1951, and thereafter at $35.00 a week during the continuation of the total temporary disability or until the further order of the Deputy Commissioner.

"The employer and insurance company shall furnish to the claimant necessary medical care to cure or decrease the present disability resulting from said injury."

XII.

That the act of the Deputy Commissioner Albert J. Cyr, acting in his capacity as Deputy Commissioner, is not in accordance with law, in that:

(a) He acted without and in excess of his powers;

(b) He acted without and in excess of his powers of jurisdiction;

(c) The evidence does not justify nor support his findings of fact;

(d) The order of compensation and award violates the Fifth Amendment to the Constitution of the United States.

XIII.

That said compensation order and award is not in accordance with the law for the reason that it is based upon an erroneous conclusion of fact or an

absence of facts to justify the conclusion, to wit: That the second injury was an injury arising out of and in the course of the employment of said defendant William Lasche; that there was no competent medical or other evidence produced at the hearing before said Deputy Commissioner to establish that said second injury in any way arose out of or occurred in the course of defendant William [6] Lasche's said employment. That there is no evidence in the record to support the award of said Deputy Commissioner. That the evidence produced at said hearing establishes that said second injury resulted from activities at the home of the said defendant William Lasche.

XIV.

That the claim for compensation and the duly transcribed notes of the testimony taken at the hearing and the award of the Deputy Commissioner are all in the custody of the said defendant Deputy Commissioner Albert J. Cyr and it is necessary for this Court to have possession of the papers and the records of said hearing and all other relevant papers in the possession of said Deputy Commissioner in order to determine whether or not the award of said Deputy Commissioner was in accordance with law.

Wherefore, complainants pray that process in due form of law according to the course of this Honorable Court may issue and that defendants may be cited to appear and answer all the matters herein

set forth and that said compensation order and award dated May 17, 1951, be set aside and declared a nullity; that a mandatory injunction issue herewith setting aside said order of May 17, 1951, and that said Albert J. Cyr and Warren H. Pillsbury, as Deputy Commissioners or their successors in office, be permanently enjoined from making or attempting to make any further orders in respect to said proceedings; and complainants pray further for such other or different relief as to this Court may seem just and proper, and for their costs incurred herein.

Dated June 14th, 1951.

MILLER, HIGGS &
FLETCHER,

By /s/ DeWITT A. HIGGS,

Attorneys for Complainants Crescent Wharf & Warehouse Company, a Corporation, and Pacific Employers Insurance Company.

Duly verified. [7]

(Copy)

U. S. Department of Labor Bureau of Employees' Compensation, Thirteenth Compensation District

Case No. 76-2740

In the Matter of:

The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

WILLIAM LASCHE,

Claimant.

Against

CRESCENT WHARF & WAREHOUSE COMPANY,

Employer,

PACIFIC EMPLOYERS INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Claim No. 3544

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 6th day of September, 1950, the claimant above named was in the employ of the employer above named at San Diego Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's & Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Pacific Employers Insurance Company; that on said date claimant herein while performing services for the employer as a longshoreman foreman sustained personal injury resulting in his disability when while easing himself down from the top of a hatch he landed on his left foot and suffered a straining injury in the region of the left hip; that written notice of injury was not given to the employer within 30 days following said injury but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant in part with medical treatment in accordance with Section 7(a) [10] of the said Act; that shortly after the said injury the claimant went to a physician of his own choosing and that the employer is not liable for such self procured medical treatment; that on the date of the hearing, April 4, 1951, the employer was officially put on notice that further medical treatment was indicated and is liable for reasonable medical expense incurred since that date; that the employee's average weekly wages at the time of his injury was in excess of $52.50; that as a result of the injury

sustained claimant was wholly disabled for 12 intermittent days from the date thereof to and including November 6, 1950; that on the morning of November 7, 1950, while the claimant herein was at home and standing on the 2nd or 3rd step of a step ladder in his garage he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur; that because of the instability of the left leg this second injury is directly attributable to the injury of September 6, 1950; that claimant has been wholly disabled beginning with November 7, 1950, to the date of the hearing, April 4, 1951, and that such disability is continuing; that compensation benefits accruing from date of the original injury to and including April 4, 1951, is twenty-three weeks at $35.00 a week, in the amount of $805.00, no part of which has been paid.

Upon the foregoing facts the Deputy Commissioner makes the following:

Award

That the employer, Crescent Wharf & Warehouse Company, and the insurance carrier, Pacific Employers Insurance Company, shall pay to the claimant compensation as follows: Forthwith $805.00 representing compensation benefits accruing to and including April 4, 1951, and thereafter at $35.00 a week during the continuation of the temporary total disability or until the further order of the Deputy Commissioner. [11]

The employer and insurance carrier shall furnish to the claimant necessary medical care to cure or decrease the present disability resulting from said injury.

Given under my hand at San Francisco, Calif., this 17th day of May, 1951.

ALBERT J. CYR,
Deputy Commissioner, 13th
Compensation District.

[Endorsed]: Filed June 15, 1951. [12]

[Title of District Court and Cause.]

ANSWER OF ALBERT J. CYR AND WARREN H. PILLSBURY

Now Come the respondents, Albert J. Cyr and Warren H. Pillsbury, Deputy Commissioners, United States Department of Labor, Bureau of Employees Compensation District, 13th Compensation District, and for their answer to the Libel for Injunction herein, admit, deny and allege:

I.

Admit the allegations contained in paragraph I, II, III, V, VI, VII, VIII, IX, and XIV of said Libel.

II.

Admit the allegations contained in paragraph IV of said Libel with the exception that the injury

complained of occurred on September 6th rather than September 5, 1950, as alleged in said paragraph.

III.

Deny generally and specifically all the allegations contained in [13] paragraph X of said Libel for Injunction and allege that all the facts and circumstances pertaining to the injury of William Lasche complained of herein are set forth in the original proceedings of Commissioner Albert J. Cyr, a certified copy of which will be presented to the Court upon the hearing thereof, and that said original proceedings are available to the complainants for inspection.

IV.

Defendants deny paragraphs XI, XII, and XIII of said Libel.

Further Answering the Libel, the defendants, Deputy Commissioners Cyr and Pillsbury, aver that it is shown by the certified copy of the record before Deputy Commissioner Cyr that the findings of fact and the compensation award complained of are supported by substantial evidence, and under the law such findings are final and conclusive and not subject to review; that at the trial the certified copy of the record before Deputy Commissioner Cyr will be offered in evidence by the defendants to be reviewed by the Court.

Wherefore, defendants pray that judgment be

entered herein affirming said award in all respects and that the libel be dismissed.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant United States Attorney Chief, Civil Division.

/s/ CLYDE C. DOWNING,
Assistant United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 24, 1951. [14]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Jacob Weinberger, May 8, 1952.

The complainants herein, Crescent Wharf and Warehouse Company and Pacific Employers Insurance Company seek a mandatory injunction setting aside a compensation order made by a Deputy Commissioner of the United States Department of Labor on May 17, 1951.

It appears that compensation was awarded for disability after an injury which occurred to William Lasche on September 6, 1950, and further compensation was awarded for disability after a second injury which occurred to the same employee

on November 7, 1950. The complainants contend that there is no evidence in the record to support an award of compensation for disability occurring after the injury of November 7, 1950.

The Commissioner found that on September 6, 1950, while William Lasche was performing services for his employer, he sustained personal injury resulting in his disability when, while easing himself down from the top of a hatch, he landed on his left foot and suffered a straining injury in the region of his left hip. The Commissioner further found that as a result of said injury Lasche was wholly disabled for 12 intermittent days from September 6, 1950, to and including November 6, 1950. Such findings are amply supported by the record.

The record before the Commissioner disclosed that after the injury of September 6, 1950, Lasche came to the office of his physician, Dr. Knudtson, complaining of severe pain in the left hip, thigh and knee; that the pain did not respond to treatment until two or three weeks had elapsed; that after two or three weeks (quoting from the physician's letter) "it began to respond slowly but was very difficult for Mr. Lasche to walk even with the support of a cane. He [17] tried to work but was unable to continue doing so."

The record further discloses that Mr. Lasche testified that after eight or nine days from the date of the original injury he was hardly able to work at all; that he could not take work because of the condition of his leg and only worked inter-

mittently after the injury of September 6, 1950.

The record further shows that he refused work on various days because of his injury, and that on November 6, 1950, the day before the second injury, he refused work.

With reference to the injury of November 7, 1950, the Commissioner found

> "that on the morning of November 7, 1950, while the claimant herein was at home and standing on the 2nd or 3rd step of a step ladder in his garage he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur; that because of the instability of the left leg this second injury is directly attributable to the injury of September 6, 1950 * * *"

The scope of this Court on a review of this sort is limited; as stated by the Supreme Court of the United States in O'Leary v. Brown-Pacific-Maxon, 340 US 504, 508, the Commissioner's findings "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." The question which confronts us is whether there is evidence to support the Commissioner's finding that the [18] second injury was directly attributable to the first.

Defendants' counsel maintain that a casual relationship existed between the first injury, sustained

in the course of employment, and the second injury which Lasche sustained at home. Citing Schneider's Workmen's Compensation Text, (3rd edition) Vol. 6, p. 53, they quote:

> "* * * It makes no difference how long the chain, nor how many links, as long as each act or link accounts for the next, the liability existing in the first injury is carried forward to the last."

Among other cases defendants' counsel has cited the case of Continental Casualty Co. v. Industrial Commission, 284 p. 313, 75 Utah 220 (1929); in that case claimant was a taxi-driver who wrenched his left leg when he fell while in the course of his employment; later he went back to his regular work, but as he was on his way thereto, walking to the car-line, he slipped and fell and broke his leg. The Commissioner found that the second accident was entirely due to his former injury three days before, "by reason of the fact that the applicant was unable to bear his full weight on the said injured limb, this being the result of the weakened condition caused by the first accident."

The Supreme Court of Utah in its opinion at page 314 cited with approval Corpus Juris on Workmen's Compensation Act, page 70, as follows:

> " 'In determining whether the physical harm sustained by the employee was the consequence of the accident or the injury, the controlling question is the continuity of the chain of causation and the absence of an intervening inde-

pendent agency; the inquiry [19] as to whether the result is the natural and probable one is immaterial.' "

Counsel for defendants have also cited a case decided under the Texas Workmen's Compensation Law (Vernon's Ann Civ. St. art 8306 et seq.), Zurich General Accident & Liability Ins. Co. v. Daffern, 5 Cir. 81 F. 2d 179, (1936). In that case the employee lifted a heavy steel shaft on April 4, 1934, and on April 9, 1934, lifted a heavy keg of nails; on both of such dates he was performing services within the scope of his employment. Following the lifting on April 9, 1934, he contracted hernia and was operated upon for such condition. As a result of the operation, claimant suffered a long confinement, and then was found to be afflicted with a spastic colon. The Court in its opinion observed (page 181) that the confinement was the "inevitable" incident of the operation for hernia, and was a "necessary" incident thereto, and such confinement aggravated preexisting ailments to produce the spastic colon which disabled the claimant, for which compensation was awarded.

At page 181 the Court continued:

"* * * When an employee suffers a specific injury in the course of his employment, he is not confined to the compensation allowed for that specific injury if that injury, or proper or necessary treatment therefor, causes other injuries which render the employee incapable of work."

A California Supreme Court case decided in 1918, Head Drilling Co. v. Industrial Accident Commission, et al., 170 p. 157 gives another instance of a second injury occurring away from the employment, but attributed to a first injury suffered in the scope of the employment. The [20] claimant sustained a fracture of the left leg and a badly comminuted fibula. He was taken to a hospital; there was difficulty in setting the bones in place and holding them for a permanent union. He was discharged from the hospital, the doctor deeming it best that he should begin to use the leg, but still supervising the case. He went to his home, the cast still on his leg, using crutches. Three days later he was sitting at his dining room table and arose to get some pictures from a shelf in back of him. There was a wrinkle in the rug which straightened out under his good foot and he caught at the table with his hand; his bad heel struck the pedestal of the table or a chair. An X-ray disclosed the bones were out of place.

The Commission found that the bones were often in danger of separation from natural causes in cases of that type; that such a separation might be anticipated; "that the evidence was insufficient to show that the separation was due to any substantial independent intervening cause or to any independent intervening cause; that said separation was instead a proximate and natural result of the original injury."

The Supreme Court, at page 158 observed:

"* * * We are of the opinion that a subse-

quent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to [21] be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld. The testimony of Scott, as to exactly what occurred on the evening of April 15th must be accepted here as true. According to this, there was nothing but the accidental striking by Scott of the heel of the foot of the injured limb against the pedestal of the table or a chair, done in the attempt to save himself from a fall, something to have been reasonably anticipated when he was discharged from the hospital in the condition in which he then was, and all of which happened without any negligence on his part. Surely, if such a thing might cause a displacement of the bones, he was in no condition to be called on to go about without an attendant, and it was reasonably to be anticipated that if he was left thus to care for himself, such a thing would occur. We have already noted the serious nature of the fracture, the length of time required to effect a

permanent reunion of the bones, and the extreme difficulty of keeping the bones in place and preventing displacement. Under all [22] the circumstances it appears to us that it might well be concluded as was concluded by the commission, that such an incident as was described by Scott, was not an independent, intervening cause, within the meaning of the law, but that the striking of the heel and consequent separation of the bones, which had been partially, but not permanently, united, was simply a proximate and natural result of the original injury."

Another California case, decided by the Supreme Court in 1915, Pacific Coast Casualty v. Pillsbury, 153 p. 24 shows the second injury in a different light than in the cases we have heretofore discussed. The employee was cranking a car while working in a garage and the radius of his right arm was broken and his wrist dislocated; the injury received proper treatment and progressed toward recovery as usual in such cases. Then a month and a half after the accident while claimant was on an automobile trip not connected with his employment the bone which had been broken slipped or shifted in such a manner that it was necessary to re-set it, thus prolonging his disability. The employer and the insurance company admitted liability for the average period that would have been required if no new injury had occurred to the bone, but refused to pay for medical treat-

ment and the prolongation of disability caused by the slipping of the bone. The Commission allowed compensation for the full time and for all medical services.

The Supreme Court observed at page 26 that the Commission had no power to award compensation for the [23] disability incident to the slipping of the bone unless such slipping was the "natural or proximate result of the original injury." The Court then referred to the law in force prior to the Workmen's Compensation Act, to the well established principle that a person injured by the negligence of another must use ordinary care to avoid aggravating or prolonging the effects of such injury and that such person could not recover for an increase of disability caused by his failure to use such care. The Court then held that an additional injury to the claimant caused by carelessly using his arm too much was not within the provisions of the statute and that he could not be awarded compensation therefor. The case was sent back to the Commission to re-hear it and to allow only for the disability which they might find would exist if the bones had not slipped.

In Deep Rock Oil Corporation v. Betchan, 35 P. 2d 905, the Supreme Court of Oklahoma announced the following principle of Workmen's Compensation law, at page 908:

> "It seems that a law designed to compensate workmen for loss of earning capacity from industrial accidents must have been intended to extend its shield at least to aggravations affect-

ing the course of the injury during convalescence when such are produced by not unnatural events and involve no omission or breach of duty * * * ''

The Court based its enunciation of this principle as follows:

"In Tippett & Bond v. Moore, 167 Okl. 636, 31 P. 2d 583, our court held disability [24] referable alone to a first injury when a second one had intervened to precipitate further incapacity. The principle is a familiar one in tort law and was stated in Hoseth v. Preston Mill Co., 49 Wash. 682, 96 P. 423, 425, in this language: 'The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury * * *' ''

While counsel for the respective parties have cited cases decided under state compensation laws, and we have reviewed others not cited, we have found no case decided under the Longshoremen's and Harbor Worker's Compensation Act which specifies the conditions under which a second accident such as Lasche's may be attributed to a first accident suffered in the scope of employment.

The Act does include in its definition of "injury" such occupational disease or infection as naturally or unavoidably results from such accidental injury, the case of Ocean S. S. Co. of Savannah, et al. v.

Lawson, 5th Cir. 68 F. 2d 55, contains language which we feel is appropriate. In that case, the employee died, not as a direct result of an injury to his foot suffered in the course of his employment, but because of a tetanus infection. The wound had been properly treated, was clean and apparently healing when the employee left the hospital. Later, he left his foot unbandaged and wore a colored sock. The Court stated, p. 56:

> " * * * The main disputable fact before [25] the commissioner was whether the infection which killed him resulted naturally or unavoidably from his injury or was caused by his own mistreatment and exposure of his wound * * * . By a fair construction of the statute a death caused by infection following an injury is caused by the injury if the infection followed naturally or unavoidably; but if the infection is not natural but extraordinary, and if it could by reasonable care have been avoided, death is not to be considered as due to the injury."

We cited this case to counsel and asked for additional briefs; counsel for defendants maintained that the doctrine of contributory negligence has no place in cases under workmen's compensation acts.

We do not agree that this is so when a second injury occurs outside the scope of the employment. We think an injured employee owes to his employer, at least while in the pursuit of the employee's own concerns, the duty of reasonable care to avoid aggravation or prolongation of his disability.

The facts show that Lasche was using a cane after the first injury, that while he had worked all but twelve intermittent days between the two accidents, he had refused work the day before the second injury because of disability. A man in such a condition who steps upon a ladder, thus bearing his full weight upon an injured leg can hardly be said to have been using any care with reference to his injury. [26]

It is our view that subsequent injury was the result of an independent intervening cause, that the subsequent injury did not follow naturally or unavoidably; that it could have been avoided by reasonable care; and, that there is no evidence in the record to support any different conclusion.

An injunction should issue, and the matter should be referred to the Commissioner to fix, after a hearing if necessary, compensation for the period which the original disability might have continued if the second accident had not occurred.

[Endorsed] Filed May 9, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried by the court without a jury, the court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1

The Court adopts the following portion of the Commissioner's Findings:

That on the 6th day of September, 1950, the claimant above named was in the employ of the employer above named at San Diego Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's [28] & Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Pacific Employers Insurance Company; that on said date claimant herein while performing services for the employer as a longshoreman foreman sustained personal injury resulting in his disability when while easing himself down from the top of a hatch he landed on his left foot and suffered a straining injury in the region of the left hip; that written notice of injury was not given to the employer within 30 days following said injury but that the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant in part with med-

ical treatment in accordance with Section 7 (a) of the said Act; that shortly after the said injury the claimant went to a physician of his own choosing and that the employer is not liable for such self-procured medical treatment."

2

The Court further finds:

That after the injury of September 6, 1950, claimant had difficulty in walking and used the support of a cane; that on November 6, 1950, the claimant refused work because of the condition of his leg.

3

The Court adopts the following portion of the Commissioner's Findings:

"That the employee's average weekly wages at the time of his injury was in excess of $52.50; that as a result of the injury sustained, claimant was wholly disabled for 12 intermittent days from the date thereof to and including November 6, 1950; that on the morning of November 7, 1950, while the claimant herein was at home and standing on the second or third step of a stepladder in his garage he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly [29] thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur."

4

The Court further finds:

That the subsequent injury of November 7, 1950,

was the result of an independent intervening cause and did not follow naturally or unavoidably, the first injury of September 6, 1950.

5

The Court further finds:

That the subsequent injury of September 7, 1950, could have been avoided by reasonable care on the part of claimant.

6

The Court further finds:

That there is no evidence in the record to support the Commissioner's finding that the second injury of November 7, 1950, was directly attributable to the injury of September 6, 1950.

From the foregoing Findings of Fact the court concludes:

1

The court has jurisdiction over the parties herein.

2

Jurisdiction of the subject matter of this controversy is vested in this court by Section 921 of Title 33 of the United States Code.

3

Complainants are entitled to an injunction restraining Defendants Albert J. Cyr and Warren H. Pillsbury, Deputy Commissioners, United States Department of Labor, from enforcing the Award dated May 17, 1951, in Case No. 76-2740, and said Case No. 76-2740 should be referred to the Deputy

Commissioners, United States Department of Labor, to fix after a hearing if necessary, compensation for the period during which the original disability [30] of September 6, 1950, might have continued if the second injury of November 7, 1950, had not occurred.

Dated this 4th day of June, 1952.

/s/ JACOB WEINBERGER,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 5, 1952. [31]

In the United States District Court in and for the Southern District of California, Southern Division

No. 1270-SD

CRESCENT WHARF & WAREHOUSE COMPANY, a Corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Complainants,

vs.

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Defendants.

ORDER

This cause having come on for hearing and the issues therein having been tried before the court without a jury, and the evidence of all the parties hereto having been heard, and the court having duly made Findings of Fact and Conclusions of Law;

Now, It Is This 4th day of June, 1952, Ordered, Adjudged and Decreed as Follows:

1. Defendants Albert J. Cyr and Warren H. Pillsbury, Deputy Labor Commissioners, United States Department of Labor, herein, their agents, servants, attorneys and privies and each of them, are hereby permanently enjoined and restrained from enforcing the Award dated May 17, 1951, in Case No. 76-2740, Claim No. 3544 [32] of United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District.

2. It Is Further Ordered, Adjudged and Decreed that the said Case No. 76-2740, Claim No. 3544, is hereby referred back to the Deputy Commissioner of the 13th Compensation District in order that he can fix, after a hearing if necessary, compensation for the period which the original disability of September 6, 1950, might have continued if the second injury had not occurred.

Dated this 4th day of June, 1952.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed June 5, 1952.
Docketed and entered June 6, 1952. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the defendants, Albert J. Cyr and Warren H. Pillsbury, Deputy Labor Commissioners, United States Department of Labor, hereby appeal to the United States Court of Appeals, for the Ninth Circuit, from the Order Granting a Permanent Injunction, entered in this action on June 6, 1952.

Dated at Los Angeles, California, this 23rd day of July, 1952.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed July 23, 1952. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages

numbered from 1 to 37, inclusive, contain the original Complaint; Answer; Memorandum of Conclusions; Findings of Fact and Conclusions of Law; Judgment (Order dated June 4, 1952); Notice of Appeal and Designation of Record on Appeal which, together with original Defendants Exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 26th day of August, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13509, United States Court of Appeals for the Ninth Circuit. Albert J. Cyr and Warren H. Pillsbury, Deputy Labor Commissioners, United States Department of Labor, Appellants, vs. Crescent Wharf & Warehouse Company and Pacific Employers Insurance Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed August 27, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13509

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a Corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Appellee.

STIPULATION FOR CONSIDERATION OF ORIGINAL EXHIBIT WITHOUT THE NECESSITY OF THE PRINTING THEREOF

It is hereby stipulated by and between the parties to this appeal through their respective counsel that due to the length of Exhibit A in this proceeding and the attachments thereto, constituting the original transcript of proceedings before the Deputy Commissioner and exhibits in connection therewith, that, subject to the approval of this Court, said Exhibit A may be considered by this Honorable Court on Appeal in its original form without the necessity of

having the same incorporated into the printed record on appeal.

MILLER, HIGGS, FLETCHER AND MACK.

By /s/ WILLIAM E. SOMMER,

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Appellant.

ORDER

This Stipulation having been presented to the Court, and it appearing that there is good and sufficient reason for this Court considering Exhibit A, as described in said Stipulation, in its original form in lieu of the same being incorporated as part of the printed record on appeal, It Is So Ordered.

Dated: September 12, 1952.

/s/ WILLIAM DENMAN,

/s/ HOMER BONE,

/s/ WM. E. ORR,
Judges, U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed September 12, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN PRINTED RECORD ON APPEAL

Appellant requests that the record as certified to the Court of United States Court of Appeals for the Ninth Circuit be printed in its entirety except for original Exhibit A and the attachments thereto which have been certified as part of the record on appeal.

Dated:

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed September 12, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant intends to rely upon the following points on appeal of the above-entitled cause:

I.

That the Court erred in holding in substance that the injured employee could not recover for his consequential injury because of his negligence in getting upon a stepladder in his then condition for the following reasons:

A.

Negligence of the employee (fault) is not an element in compensation law either with respect to recovery for the original injury or any subsequent result of said injury, including the effects of a consequential injury.

B.

Even if negligence were material as to consequential injuries, the Deputy Commissioner as the trier of the fact would have the right and the duty of determining whether the injured employee was careless and whether such carelessness caused the second injury. In determining such fact for itself, the Court usurped the power of the Deputy Commissioner, contrary to the great weight of authority.

Dated:

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney.

[Endorsed]: Filed September 12, 1952.

No. 13509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District, and WILLIAM LASCHE,

Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Appeal From the United States District Court for the Southern District of California, Southern Division.

BRIEF FOR APPELLANTS CYR AND PILLSBURY.

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ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District, and WILLIAM LASCHE,

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Appeal From the United States District Court for the Southern District of California, Southern Division.

BRIEF FOR APPELLANTS CYR AND PILLSBURY.

Jurisdictional Statement.

This case arises upon a complaint for judicial review of a compensation order filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, U. S. Code, Title 33, Chapter 18, Section 901 *et seq.*

Section 21(b) of the Longshoremen's Act, *supra,* provides:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part,

through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Jurisdiction of this court upon appeal is invoked under Section 1291, Title 28, U S. Code.

Statement of Case.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, Honorable Jacob Weinberger, District Judge, setting aside a compensation order filed May 17, 1951, by Deputy Commissioner Albert J. Cyr, one of the appellants herein in which he awarded compensation to William Lasche who sustained an injury to his left leg on September 6, 1950, in the course of his employment as a longshoreman and who thereafter on November 7, 1950, because of the weakness of said leg sustained an additional injury thereto when said leg gave out while he was standing upon the second or third step of a step ladder in his garage. The liability of the employer was insured by the appellee, Pacific Employers Insurance Company. The said compensation order was issued pursuant to the provisions of the Longshoremen's Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. A. Section 901 *et seq.*

In the compensation order complained of, the deputy commissioner found the facts in part as follows:

"That on the 6th day of September, 1950 the claimant above named was in the employ of the employer above named at San Diego Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's and Har-

bor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Pacific Employers Insurance Company; that on said date claimant herein while performing services for the employer as a longshoreman foreman sustained personal injury resulting in his disability when while easing himself down from the top of a hatch he landed on his left foot and suffered a straining injury in the region of the left hip; . . . that as a result of the injury sustained claimant was wholly disabled for 12 intermittent days from the date thereof to and including November 6, 1950; that on the morning of November 7, 1950 while the claimant herein was at home and standing on the 2nd or 3rd step of a stepladder in his garage, he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur; that because of the instability of the left leg this second injury is directly attributable to the injury of September 6, 1950." . . .

Without referring to the evidence in detail, it is desired to point out that the evidence was not disputed and showed that after the original injury claimant went to the doctor but changed doctors because his leg was not getting any better; meantime, he was working off and on. Even after the change of doctors there was no response to treatment until about November 1 when there was a lessening of pain and disability [T. 37*]. It was then on November 7, that the injured leg gave way as described in the compensation order above.

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*T. refers to typewritten transcript of hearing before the deputy commissioner.

The court below set aside the award for the disability resulting from the injury of November 7, 1950, upon the ground in substance that the employee's negligence in getting upon the step ladder caused the second injury and therefore that the employee could not recover. The court stated that while the absence of fault or negligence is not a condition precedent to recovery for an injury sustained in the course of employment (see section 4(b) of Longshoremen's Act, 33 U. S. C. A. sec. 904(b) providing that compensation shall be payable *irrespective of fault* as a cause for the injury) this provision does not apply to so-called "consequential" injuries (injuries which result from the weakness of the injured member or similar circumstances) which occur outside the scope of employment.

The present appeal followed.

Question Involved.

There is but one question or possibly two involved in this case. 1. Whether an employee who has injured a member of his body in the course of employment and who subsequently sustains another injury to that member by reason of its weakened condition is barred from a recovery for the second injury because his carelessness contributed to said injury. 2. Assuming *arguendo* that fault be a factor in the determination of the right to recovery who shall make the determination as to the existence of fault and its relation to the second injury, the deputy commissioner or the reviewing court?

I.

Fault Is Not a Factor in Compensation Law.

Before entering upon a discussion of this point, it may be helpful briefly to discuss so-called "consequential injuries" and their place in compensation law.

It sometimes happens that an employee who has sustained an injury in the course of employment particularly to some member such as an arm or leg, sustains a subsequent injury to the same member or elsewhere because of the weakness of the injured member. This is called a "consequential injury" because as the name implies it is a consequence of the first injury. A few of the cases involving consequential injuries are *Western Lime and Cement Co. v. Ball,* 217 N. W. 303, 194 Wis. 606 (where as in the instant case the second injury was traceable to and caused by a prior injury from jumping, affecting the thigh muscles); *Continental Casualty Corp. v. Industrial Comm.,* 284 Pac. 313, 75 Utah 220; *Kelly v. Federal Ship and Drydock Co.,* 64 A. 2d 92 (N. J. 1949); *Randolph v. Dupont Co.,* 33 A. 2d 301 (N. J. 1943); *Hall v. Chapman,* 14 N. Y. S. 2d 666, 257 App. Div. 1091 (1939); *Prentice v. Weeks,* 267 N. Y. Supp. 849, 239 App. Div. 227, aff'd. 191 N. E. 538, 264 N. Y. 507 (1934); *Gallagher v. Hudson Coal Co.,* 178 Atl. 161, 117 Pa. Super. 480 (1935). A consequential injury may happen at home or elsewhere. The basis of compensability for the effects of the consequential injury is the causal connection between the consequential injury and the original injury. See Workmen's Compensation Text, 3rd Edition, Volume

6, page 53, by Schneider. It is immaterial whether the original injury was the "proximate cause" of the second injury or the "direct cause" or the "sole cause." No such tests are fixed in the Compensation Act and the courts have uniformly refused to interject them in applying the law to compensation cases. (*Southern Stevedoring Co. v. Henderson,* 175 F. 2d 863 (C. A. 5, 1949); *Manitowoc Boiler Works v. Industrial Commission,* 165 Wis. 592, 163 N. W. 172, 106 A. L. R. 82 (1917); *Hartford Accident and Indemnity Co. v. Cardillo, Deputy Commissioner,* 112 F. 2d 11, 17 (App. D. C. 1940); *Cf.* Morris, *On the Teaching of Legal Cause* (1939), 39 Col. L. Rev. 1087; *Avignone Freres, Inc. v. Cardillo, Deputy Commissioner,* 117 F. 2d 385 (App. D. C. 1940); *Texas Indemnity Co. v. Staggs,* 134 Tex. 318, 134 S. W. 2d 1026 (1940); *Travelers Insurance Company v. Peters,* 14 S. W. 2d 1007 (Tex. 1929); *Cudahy Pkg. Co. v. Parramore,* 263 U. S. 418; *Truck Insurance Exch. v. Industrial Acc. Comm.,* 167 P. 2d 705; *Hanson v. Robitshek,* 209 Minn. 596, 297 N. W. 19 (1941); *N. Y. Central R. R. Co. v. White,* 243 U. S. 188.) A concurring cause is a sufficient cause to establish the right to compensation. (*Southern Stevedoring Co. v. Henderson,* 175 F. 2d 863 (C. A. 5, 1949); *Hampton Roads Stevedoring Co. v. O'Hearne,* 184 F. 2d 76 (C. A. 4, 1950); *Clayton v. Dept. of Labor,* 217 P. 2d 783 (Wash. 1950); *Victor Oolotic Stone Co. v. Crider,* 106 Ind. App. 461, 19 N. E. 2d 478 (1939); *Texas Indemnity Co. v. Staggs,* 134 Tex. 318, 134 S. W. 2d 1026 (1940).) The refinements of

common law concepts as to cause and effect have no place in the administration and application of compensation law. (*Burns S. S. Co. v. Pillsbury,* 175 F. 2d 473 (C. A. 9, 1949); *Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469, 481; *Cf. N. L. R. B. v. Hearst,* 322 U. S. at pages 120, 124, 127, 131. Accord: *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504.)

Therefore when the court below discusses whether the injury to the employee's leg which resulted from the fall from the ladder was "directly attributable" to the first injury, or whether the second injury was a "proximate and natural result" of the original injury and the principles applicable in "tort law," it was interjecting in compensation law the application of tests and principles which are not in the law and which the cases and authorities which we have cited above have uniformly ruled out.

In addition to all of the above, Section 4(d) of the Compensation Act, 33 U. S. C. A. Section 904(d), provides:

> "compensation shall be payable irrespective of fault as a cause for the injury."

The court below was of the opinion that this provision does not apply to consequential injuries. There is no such restriction in the provision itself; there is no logical reason for eliminating fault as an element with reference to the original injury but not as to the consequences of that injury. To so "interpret" said provision is to interpolate. The provision that compensation shall be payable irre-

spective of fault as a cause of injury is about as broad and sweeping as language could make it. To deny compensation because the injured employee's fault contributed to the injury is to do the very thing which the act interdicts.

We pass over the provision in the Act (Sec. 3(b), 33 U. S. C. A. Sec. 903(b)) which complements Section 4(d) *supra* and provides:

> "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

As this Court and other courts have stated, fault is out "unless it amounts to the kind and degree of misconduct prescribed in definite terms by the Act. It is entirely inconsistent with reading into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault." (*Hartford Accident and Indemnity Co. v. Cardillo,* 112 F. 2d 11, 17 (1940), cert. den. 310 U. S. 649. Accord: *Burns S. S. Co. v. Pillsbury,* 175 F. 2d 743 (C. A. 9, 1949).)

The view that contributory fault is out as an element of consideration is supported by decisions under the New York Workmen's Compensation Law, which was adopted almost verbatim in the Longshoremen's Act. Under the usual rules of construction the adoption of a statute generally carries with it the construction placed upon the adopted statute. (See House Report No. 1190, 69th

Congress, 1st Session, p. 2; *L. S. Case v. Pillsbury,* 148 F. 2d 392 (C. A. 9, 1945); *Marshall v. Mahoney,* 56 F. 2d 74 (C. A. 9, 1932); *Hartford Accident & Indemnity Co. v. Hoage,* 85 F. 2d 411 (App. D. C. 1936).)

In *Colvin v. Emmons & Whitehead,* 215 N. Y. Supp. 562, 216 App. Div. 577, which was decided in 1926 (prior to the enactment of the Longshoremen's Act) the question of the materiality of contributory negligence in the determination of liability for a consequential injury was squarely before the court. In that case the injured employee, as in the instant case, fell from a ladder at his home when he was two or three feet from the ground resulting in his injury and death. He had previously been injured at work and was thereafter subject to dizzy spells. The court stated:

> "The Board found that death 'was not naturally and unavoidably the result of the injuries' of December 12, 1917, and also made the following findings: 'Deceased had no business to be performed on the ladder, he was not employed by anybody and in going up on the ladder, he placed himself in a hazardous, unnatural and improper place for a man in his physical condition.' *This latter finding is immaterial and is strongly suggestive that this case has been decided on an improper theory. Indiscreet and negligent it probably was for the deceased to go upon the ladder but indiscretion and negligence constitute no defense.* The question for determination was whether there was causal relationship between the death and the accident of 1917. The statute furnishes the tests for

determining that question. Section 2, subdivision 7, of the Workmen's Compensation Law of 1922 defines 'injury' as meaning an accidental injury 'arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom' and subdivision 8 of said section defines 'death' as meaning 'only death resulting from such injury.' (See, also, Workmen's Compensation Law of 1914, Sec. 3, subds. 7, 8, as amd. by Laws of 1917, chap. 705.) Within the purview of these definitions the inquiry should have been first whether the vertigo was due to the accident of 1917. If so and it caused the deceased to fall from the ladder his death resulted from an 'injury' 'arising out of and in the course of employment' and causal relation between accident and death existed. It is of course true in a superficial sense that the decedent would not have died had he not gone upon the ladder, but it may be equally true that having gone upon the ladder he would not have fallen had he not been attacked by vertigo due to his original accident. The case should have been considered from the latter standpoint because as already stated *indiscretion, poor judgment and negligence on the part of the employee do not defeat a claim for compensation.*

On the material question in the case the Board has made no finding. It apparently decided the case on the immaterial finding above quoted. The material question was whether the vertigo which concededly caused the deceased to fall was due to the accident of 1917. A specific finding on this important question should have been made. Because of the failure to make such finding the decision must be reversed. (Matter of *Shearer v. Niagara Falls Power Company,* 242 N. Y. 70.) If on another hearing the Board on the evidence shall find that vertigo resulted

from the accident of 1917 and that vertigo caused deceased to fall from the ladder and lose his life causal relationship between the accident of 1917 and death will be established. All concur. Decision reversed and claim remitted, with costs to the claimant against the employer and the insurance carrier to abide the event." (Emphasis supplied.)

Assuming that Section 4(b) of the Act, 33 U. S. C. A. Section 904(b), providing that compensation shall be payable irrespective of fault would somehow permit a construction that fault may bar the right to compensation, such construction would not be a liberal one which the courts have enjoined should be applied to the administration of the law. (*Baltimore & Philadelphia Steamboat Co. v. Norton, Deputy Commissioner,* 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D. C. 228, 59 F. 2d 1042 (1932); *Associated General Contractors of America, Inc. v. Cardillo, Deputy Commissioner,* 70 App. D. C. 303, 106 F. 2d 327 (1939); *De Wald v. Baltimore & O. R. Co.,* 71 F. 2d 810 (C. A. 4, 1934), cert. den. October 8, 1934, 293 U. S. 581. Accord: *Contractors, P. N. A. B. v. Pillsbury,* 150 F. 2d 310 (C. A. 9, 1945).)

Since the deputy commissioner did find in the instant case upon undisputed evidence that the second injury was due to the effects of the first injury the court below should have sustained the award. (*O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504; *Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469.)

II.

Assuming Fault to Be an Element, a Finding With Reference Thereto Would Lie With the Deputy Commissioner and Not the Reviewing Court.

The deputy commissioner made no finding with reference to the negligence of the employee in getting upon the ladder. The reviewing court did so. The powers to be exercised by a reviewing court upon judicial review of an award of compensation has frequently been stated to be that which are expressly conferred by the statute. (*Associated Indemnity Corp. v. Marshall, Deputy Commissioner,* 71 F. 2d 235 (C. A. 9, 1934); *Shugard v. Hoage, Deputy Commissioner,* 67 App. D. C. 52, 89 F. 2d 796 (1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N. W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S. W. 2d 65 (Tex. 1928); *Nierman v. Industrial Comm.,* 329 Ill. 623, 161 N. E. 115 (1928); *Town of Albion v. Industrial Comm.,* 202 Wis. 15, 231 N. W. 249 (1930); *Joseph W. Greathouse Co. v. Yenowine,* 193 S. W. 2d 758 (Ky. 1946); *Bassett, Deputy Commissioner v. Massman Construction Company,* 120 F. 2d 230 (C. A. 8, 1941), cert. den. 62 S. Ct. 92.) If there was an absence of a finding upon a material fact (whether the injured employee was negligent and whether such negligence contributed to or caused the second injury) the proper procedure would have been to remand the case to the deputy commissioner for that purpose. (*Colvin v. Emmons, supra,* 215 N. Y. Supp. 562, 216 App. Div. 577; *Hillcone S. S. Co. v. Steffen,* 136 F. 2d 965 (C. A. 9, 1943).) The reviewing court has no authority to make new and independent findings. (*Marshall v. Pletz,* 317 U. S. 383, 388.) If the question of contributory negligence is material the deputy commissioner would be the proper person to determine in

the first instance whether an employee with an injured leg who was able to work at longshore work except at certain heavy assignments [T. 9, 11] was negligent in getting upon the second or third step of the ladder. Incidentally, the finding of the court below that "claimant had difficulty in walking and used the support of a cane; that on November 6, 1950 [the day before the second injury] the claimant refused work because of the condition of his leg" is somewhat misleading in that it leaves the impression that at the time of the second injury claimant used a cane. There is no evidence in the record to show that claimant used a cane after he returned to work following the first injury. Claimant returned to work on September 25, 1950, and worked intermittently thereafter [see Ex. A, T. 27]. It is unlikely he could do longshore work with a cane. The refusal of work on November 6, 1950, was for the same reason as the refusal on September 26 and 27; October 10, 14, 20, 23, 28, 29 and 31 [see Ex. A, T. 27], namely, that after his return to work following the first injury, claimant had to refuse certain work, which was beyond his capacity in his condition [T. 9, 11].

Conclusion.

In view of the above it is respectfully submitted that the deputy commissioner's finding to the effect that claimant's injury on November 7, 1950, was attributable to the injury of September 6, 1950 (the deputy commissioner found that it was "directly" attributable; there is no such requirement and the adverb may be regarded as surplus-

age) is supported by evidence and under the authorities should be sustained. (*O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504.) The order of the court below setting aside the award was improper and should be reversed.

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BRIEF FOR APPELLEES CRESCENT WHARF & WAREHOUSE COMPANY AND PACIFIC EMPLOYERS INSURANCE COMPANY

Question Involved

One of the main questions involved here is whether a consequential injury arises out of the employment where it is due to a new and added peril to which the employee has needlessly exposed himself. Another question is whether or not the District Court is bound

to unqualifiedly accept the findings of the Deputy Commissioner. Finally, there is the question of whether or not a causal relationship between the injury and the employment must be established before a compensation award is justified.

I

A Consequential Injury Cannot be said to Arise Out of the Employment where it is Due to a New and Added Peril to Which the Employee by His Own Conduct Has Needlessly Exposed Himself.

No one would take issue with counsel for appellants' statement that negligence or fault of the applicant is not a defense to a claim under most Workmen Compensation Acts. This statement, however, should be set in its proper context as referring to an injury which occurs in the course of the employment and arises out of the employment. It is the contention of the appellees that in view of the original injury received by Lasche, he failed to use reasonable care and exposed himself to an unreasonable risk that resulted in the second injury and that this failure to use reasonable care bars him from recovering from appellees for the results of the second injury. Appellees cite the following authorities in support of the above:

In *58 American Jurisprudence, Workmen's Compensation*, Section 200, page 709, it is said:

> "A distinction is to be observed in respect of the negligence or misconduct of the employee be-

fore and after the occurrence of the accident or injury upon which the claim is founded, it being generally agreed that there is no right to compensation for disability or death proximately resulting from negligence or misconduct on the part of the employee subsequent to the original injury."

And again, in *58 American Jurisprudence, Workmen's Compensation,* Section 322, page 801, it is said:

"It is universally recognized that it is the duty of an injured employee to exercise reasonable care to minimize the effect of the injury, and it has been held accordingly in a number of cases, that compensation cannot be allowed for such disability as proximately results from the negligent omission of the employee to care for the injury. The test of negligence in such cases is whether a person of ordinary prudence would have followed the same course of conduct under like circumstances."

In discussing the problems of subsequent injury and aggravation of original injury, the authors of *American Jurisprudence in Vol. 58* at page 775, state as follows:

"A subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury . . . . On the other hand, the facts and circumstances may be such as to establish the second injury as an independent, intervening cause, the effects of which cannot be included in computing the compensation allowable for the original injury, the determination of the question in each case being one of fact to be decided on the evidence."

The same general subject matter is discussed in 54 A.L.R. 642 under the subject "Workmen's Compensation—Neglect of Injury . . . Premature Use of Injured Member", where it is said:

> "Where the incapacity suffered by the employee is not caused by the accident, but by his own misconduct in faliing properly to care for the injuries, it was held in *Pacific Coast Casualty Co.* vs. *Pillsbury*, 171 Cal. 319, 153 Pac. 24, that an additional injury caused by using an injured arm too soon does not arise out of the employment.
>
> "The aggravation of an injury caused by the employee engaging in a boxing match, where the wound had practically healed and would have caused no further trouble had it been given a little more rest, is the proximate cause of the incapacity, and no recovery can be had therefor under the Workmen's Compensation Act."
>
> *Kill* vs. *Industrial Comm.* 160 Wis. 549, 152 N.W. 148

Again, in 7 A.L.R. 1186, it is said at page 1188:

> "And in *Blackall* vs. *Winchester Repeating Arms Co.*, 1 Conn. *Comp. Dec.* , 183, where an employee suffering from an incurable disease fell while engaged in her employment and received an injury which would ordinarily have been trivial, and before she was able she left her bed and fell again on account of weakness, and sustained injuries which hastened her death by aggravating the disease, it was held that death was not due to the original injury and had no causal connection

> with it, but that compensation should be allowed only for the period of incapacity which would ordinarily result from the original injury."

A case which inferentially holds that fault of the employee is to be considered where there is consequential injury is *Otoe Food Products Co.* v. *Cruickshank,* 141 Neb. 298, 3 N.W. (2d) 452, 142 A.L.R. 816. There the employee suffered an accident to his right eye in the course of his employment. Later another accident occurred not in the course of employment and his right eye was again affected. In discussing this the Court said:

> "The medical experts were unable to determine the degree of disability, if any, caused by the second accident, as distinguished from the first accident, or just how much, if any, the second accident contributed to the loss of vision of the employee's right eye. It was not wilfully or negligently brought about through any conduct of the employee and he in no manner contributed to it . . . . ."

Two California cases have discussed this problem. In *Pacific Coast Casualty Co.* vs. *Pillsbury,* 171 Cal. 319, 153 Pac. 24, the employee received a broken arm in the course of his employment. A month later, while on a private trip, it was found that the bones had slipped. The Industrial Accident Commission gave an award for this new disability. This was held to be error. At page 323 the Court said:

"An examination of the act in question shows that the legislature has not even attempted to provide compensation for such collateral injuries, or to empower the Industrial Accident Commission to do so. It creates a liability against an employer in favor of his employee only 'for any personal injury sustained by his employees by accident arising out of the employment and in the course of the employment' and in favor of dependent persons of death ensues from such injury (Citing statute). Certain conditions must concur but they do not enlarge the scope of the above quoted language. This clearly does not include an additional injury to the employee from an accident to him occurring after the employment had ceased and while he was engaged in his own affairs outside of and not connected with his employment.

"This would be true as well where the subsequent injury is occasioned by the negligence of the injured person, or of some third person, without accident, as where it is accidental, if the subsequent injury occurs after the employment has ceased and is neither the natural nor the proximate result of the injury received in the course of the employment. Under the law in force prior to the Workmen's Compensation Act the principle was well established that a person injured by the negligence of another must use ordinary care to avoid aggravating or prolonging the effects of such injury, and that he cannot recover for an increase of disability caused by his failure to use such care (citing cases). An additional injury to McCay caused by carelessly using his arm too soon, is as much a new injury, not within the terms of

> the constitution or statute, as if it had occurred by accident. The Commission, upon the facts shown, was therefore without power to award compensation for the additional disability or for the expenses caused by the slipping of the broken parts of the bone."

In *Head Drilling Co.* vs. *I.A.C.*, 177 Cal. 194, 170 Pac. 157, the employee fractured his leg in the course of employment. Less than two months later he struck the heel of the injured leg on a table at home causing a new separation of the bones. This was held to be compensable, but the court noted that the employee had not been negligent in respect to the consequential injury. At page 197 it was said:

> "According to this there was nothing but the accidental striking by Scott of the heel of the foot of the injured limb against the pedestal of the table or chair, done in an attempt to save himself from a fall, something to have been reasonably anticipated when he was discharged from the hospital in the condition in which he then was, *and all of which happened without any negligence on his part.*" (Emphasis added)

In concurring opinion Justice Shaw stated at page 198:

> "It follows that a 'further disability' not caused by the original injury, but by the employee's own negligence and not happening in the course of a subsequent employment by the same employer, and arising out of it, is not compensable at all under the act. This being so, the award for the further

> disability here under review can be sustained only upon the ground that the subsequent accident and resulting displacement of the fractured bone was not the result of a lack of ordinary care on the part of the injured employee . . . . The finding of the Commission is in effect a finding that at the time of the second accident Scott was not guilty of a lack of the ordinary care which reasonably prudent persons in his condition exercise for their own safety from injury."

The Supreme Court of Oklahoma has also touched on this subject. In *Deep Rock Oil Corp.* vs. *Betchen,* 35 Pac. (2d) 905 at page 908 it said:

> "It seems that a law designed to compensate workmen for loss of earning capacity from industrial accidents must have been intended to extend its shield at least to aggravation affecting the course of the injury during convalescence when such are produced by not unnatural events and involve no omission or breach of duty . . . . In *Tippett & Bond* vs. *Moore,* 167 Okla. 636, 31 P. 2d 583, our court held disability referable alone to a first injury when a second one had intervened to precipitate further incapacity. The principle is a familiar one in tort law and was stated in *Hoseth* vs. *Preston Mill Co.,* 49 Wash. 682, 96 P. 423, 425, in this language: 'The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury . . .' "

Two cases under the Longshoremen's Act have discussed the problem of the conduct of an employee in respect to his injury. In *Ocean S. S. Co. of Savannah, et al.* vs. *Lawson, et al.*, 68 F(2d) 55, one Lee was injured December 20, 1928 while working aboard ship. His foot was caught in a moving stage. He was discharged from the hospital on December 28th and on January 3rd was in Florida wtih his foot unbandaged, in colored sock and infected. He died January 10, 1929. Deputy Commissioner found that accident of December 20th was a contributing cause of his death. On page 56 it was said:

> "The main disputable fact before the Commissioner was whether the infection which killed him resulted naturally or unavoidably from his injury or was caused by his own mistreatment and exposure of his wound. We do not think the findings of the Commissioner answer this question and by consequence they do not establish a case for a death award. By a fair construction of the statute a death caused by infection following an injury is caused by the injury if the infection followed naturally or unavoidably; but, if the infection is not natural but extraordinary and if it could by *reasonable care* have been *avoided*, death is not to be considered as due to the injury . . . . . It follows that his fact findings must be specific and be sufficient under the law to support the award. Florida vs. U. S. 282, U. S. 194"

In the case of *Penn. Stevedoring Corp.* vs. *Caudillo*, 72 Fed. Supp. 991 (1947) the facts in brief were that

the employee was drowned when he left his gasoline tractor on one float and went to an adjoining float. The adjoining float did not belong to his employer. At page 994 the court said:

> "Plaintiffs rely on 71 C.J. 657: 'An accident cannot be said to arise out of the employment where it is due to a new and added peril to which the employee by his own conduct has needlessly exposed himself, unless there has been an acquiescence by the employer.' "

But the court held that in this case there was evidence sufficient to establish acquiescence by the employer. In our instant case no such acquiescence can possibly be found as the employer did not know that applicant was going to climb a ladder in the garage of his residence.

In respect to the *Ocean S. S. Co case,* supra, it should be noted that the trial judge relied heavily on this case in his decision. Yet counsel for appellants have not cited or discussed this case in their brief. They cannot deny that this case holds that if the consequential injury (infection here) could have been avoided by reasonable care, it is not compensable.

In summary then, the above authorities hold that an injured employee while pursuing his own affairs owes his employer the duty of reasonable care to avoid aggravation or prolongation of his disability. Under the facts of the instant case, the employee although unable to work the day before (See Exhibit A, Transcript

page 27) because of his bad leg was climbing a ladder in his garage at home when the second injury took place. The second injury was thus the result of an independent intervening cause and did not follow naturally or unavoidably from the first injury. There is no evidence in the record to support any conclusion other than that the second injury could have been avoided by reasonable care.

II

In a Proceeding Under the Longshoremen's and Harbor Workers' Act, the Reviewing Court is Not Bound to Accept the Findings of the Deputy Commissioner.

The Longshoremen's and Harbor Worker's Act, U.S.C.A., Title 33, Section 921 (b) sets forth the conditions under which a compensation order may be set aside. It says in part as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . ."

In discussing findings the Court in *Ocean S. S. Co of Savannah, et al.* vs. *Lawson, et al.*, supra, at page 56, stated:

> "The commissioner found that the maritime industrial injury caused the disability, but was only a contributing cause of the death, without any further explanation. The finding is just as consistent with the conclusion that the infection was caused by Lee's misconduct and neglect of his wound as that it came about unavoidably.

> "The Commissioner and not the court is to find such fact and his conclusions, if supported by evidence, are final. It follows that his fact findings must be specific and be sufficient under the law to support the award. Florida vs. U. S. 282, U. S. 194."

In the instant case there is no finding as to whether or not the employee acted with reasonable care in climbing a ladder under the circumstances existing at that time. It is, thus, submitted that the award of the Deputy Commissioner was "not in accordance with law."

The scope of jurisdictional review in Longshoremen's and Harbor Workers' Act cases was discussed in some detail in the case of *O'Leary* vs. *Brown-Pacific-Maxon*, 340 U.S. 504. In that case both sides admitted that the scope of judicial review of findings of fact in a Longshoremen's and Harbor Workers' Act case was governed by the Administrative Procedure Act of June 11, 1946, in 60 Statute 277, 5 U.S.C. Section 1001, et seq. The court then went on to say at page 508:

> "The standard, therefore, is that discussed in *Universal Camera Corp.* vs. *Labor Board*, ante p. 474. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

The case referred to above, *Universal Camera Corp.* vs. *N.L.R.B.*, 340 U.S. 474, was an appeal of an administrative hearing before the N.L.R.B. One ques-

tion was whether the Administrative Procedure Act affected the scope of review of an administrative hearing before the N.L.R.B. At page 487 the Supreme Court said:

> "And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act."

And, again, at page 488:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The effect of the Administrative Procedure Act is further explained in the Universal Camera Case at page 490. It is there said:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function Congress has imposed on them responsibiltiy for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited by en-

forcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

It should again be noted that the *Brown-Pacific-Maxon* case, supra., held that the standard for judicial review in Longshoremen's and Harbor Workers' Act case is the same as that discussed in the *Universal Camera Corp. case.* It is for this reason that appellee has quoted at some length from the latter case.

III

Although Proximate Cause as Applied in Tort Cases is Not Applicable to Compensation Cases, a Causal Connection or Relation Between the Injury and the Employment Must be Established.

One of the main questions argued in the District Court was whether or not the doctrine of causal relationship applied to compensation cases such as we have here. It is noted that appellants' brief contains no further discussion of this problem. Appellees still contend it is the root of the problem involved herein. A review of the authorities may be helpful in clarifying this point.

In *Manitowoc Boiler Works* vs. *Industrial Commission,* 163 N.W. 172, a fifteen per cent penalty was added to the award because the employer violated the Commission's rules in failing to guard the wheels of a crane that had killed the employee. In that case the court said: "The chain of physical causation is complete and whether or not the failure to guard is the proximate cause of the injury in the sense in which that term is used in the law of negligence is immaterial." It should be noted that the court still found it necessary to find a complete chain of physical causation.

In the *Hartford Accident and Indemnity Co.* vs. *Cardillo Deputy Commissioner,* 112 F. 2nd 11, the plaintiff was injured in a fight with his superior, who kept calling him "Shorty". The plaintiff called his superior a vile name, and the superior struck him. The claim is made that this did not arise out of his employment. At Page 17 the court said: "The limitation of course, is that the accumulated pressures (on the employee) must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating outside the working relation and not substantially magnified by it. - - - - - - - -".

In the case of *Avignone Freres, Inc.,* vs. *Cardillo, Deputy Commissioner,* 117 F. 2nd, 385, a diabetic employee in August, 1936, bruised his toe which became infected, leaving a permanently unhealed stump after four amputations. (All the way up to his knee).

His last illness was diagnosed as pneumonia. The death certificate gave cause of death as diabetis. An attending physician testified that the immediate cause of death was due to the particular hemorrhage present at the brain and the death was entirely respiratory. A pathologist said that the employee died of a kidney ailment. Two attending physicians said there was no causal connection or relation between the injury with its consequent series of operations and the man's death. But there was some testimony that all of the above factors resulted in the employee's death. The award was upheld, the court saying at Page 386: "There was abundant testimony to the effect that such an injury to such a man, with such consequences, might cause death and some testimony that it did so." In this case the court clearly indicates that a causal relation between the injury and the employment must be established.

In the *Texas Indemnity Company* vs. *Staggs,* 134 S.W. 2nd, 1026, the employee fell on the steps of his home and struck his head on a concrete block, but went on to work. One and a half hours later he died at work. The court at Page 1028 said: "It is well settled that in a suit under the Compensation Law, it is not necessary for the claimant to show that the injury proximately caused disability or death. Recovery is authorized if a causal connection is established between the injury and the disability, or death. 'Producing cause' is the term most frequently used in compensation cases. - - - - - The approved defiinition of 'proximate cause' in negligence cases, and the approved definition

of 'producing cause' in compensation cases, are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness. - - - - -"

In the case of *Travelers Insurance Co.* vs. *Peters*, 14 S.W. 2nd, 1007, the employee was injured while wheeling coke in a wheelbarrow. He fell on the handle of the wheelbarrow, which had fallen from the platform a distance of four feet. Uremic poisoning set in and he died a week later. The court said at Page 1008: "We are of the opinion that the rule of proximate cause has no application to cases arising under the Workmen's Compensation Act. - - - - - It is true that there must be established a causal connection between an injury and the death of an employee, before a recovery would be authorized. If, however, the injury is shown to be the producing cause of the death, a finding is justified that death was due to the injury, if it arises in the course of and out of the employment. - - - - -"

In the case of *Cudahy Packing Company* vs. *Paramore*, 263 U. S. 418, the cause of action arose under the Utah Workmen's Compensation Law. The accident occurred on a public road when the employee was caught crossing the railroad tracks in a car, and occurred some seven minutes before work started. Under the facts, the accident was held compensible, the court saying at Page 423: "It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly un-

reasonable and arbitrary, as to subject it to the bar of the Constitution; but when the accident has any such relation, we should be cautious about declaring a state statute creating liability against the employer invalid upon that ground." Speaking of liability under the Workmen's Compensation legislation, the court goes on to say: "The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment, because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another, with which the former has no connection; but it is to say that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause. - - - - - Whether a given accident is so related, or incident to the business, must depend entirely upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident happened on a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with, his employment, is subjected peculiarly or to an abnormal degree."

In the case of *Truck Insurance Exchange* vs. *Industrial Accident Commission*, 167 P. 2nd, 705, the em-

ployee was killed going in his car from work to his home which was furnished by the employer. It was held that the death was compensible, the court at Page 706 stating: "An injury to be compensible, must arise out of the employment, must be proximately caused by the employment, and the employee at the time of injury, must be performing service growing out of and incidental to his employment and - - - acting within the course of his employment. (Labor Code Section 3600, sub-sections b and c)." The court further added: "A causal connection between employment and an injury by accident on a public road can properly be found where the employee by reason of and in connection with his employment, is peculiarly subject to the danger to which the general public is also exposed."

In the case of *Hanson* vs *Robitshek-Schneider Company,* 297 N. W. 19, the employee left the plant to go and get his car in order to come back to the plant for some samples that he was going to use the next day. He was assaulted by two strangers and died two months later. The death was held compensible, the court at Page 21 stating: "It is significant that in defining compensible accident, the Workmen's Compensation Law makes no mention of cause or causation as such. Impliedly, it thereby rejects or at least modifies, the standard of proximate causation determinative in tort litigation. - - - -" The court went on to say: "So it is enough that injury follows as a natural incident of the work - - - as a result of the exposure occasioned by the nature of the employment. If the employment creates a

special hazard from which injury comes, then, within the meaning of the statute, there is that 'causal relation' between employment and result which many decisions hold essential under the requirement that the injury arose 'out of' the employment."

In the case of *Southern Stevedoring Company* vs. *Henderson,* 175 F. 2nd, 863, a stevedore suffered a coronary thrombosis while working in the hold of a ship. He immediately left the hold by the only means of egress, a perpendicular ladder 30 feet long, but died within 15 minutes after reaching the deck. The evidence was that death was hastened by climbing the ladder, and a heart attack on the deck was actually what killed him. It was held that the death was compensible as one occurring accidentally in the course of employment. The court saying at Page 865: "Under said act, - - -, and the concept of proximate cause as it is applied in the law of torts, is not applicable."; and again at Page 866: "He might have lived a long time if he had rested sufficiently after the first symptoms of his disease appeared; but the conditions of his employment made it necessary for him to climb the ladder in order to leave the industrial prmises." (N.B.— The court is talking about causal connection and trying to tie the death into the employment. Can it be said in our case that the condition of employment made it necessary for claimant to climb the ladder in his own garage two months after the alleged injury of September 6, 1950?) Again at Page 866 the court said: "- - - under the act injury means accidental injury arising out

of and in the course of the employment;". It should be noted that every case cited in this case pertaining to injuries or death of an employee who had a previous disability, relates the death to an incident of the employment. For example, see *London Guarantee and Accident Company vs. Hoage,* 72 F 2nd, 191, where a baker died suddenly from heart failure while working around an oven where the temperature ranged from 110° to 120°. The court sustained an award to the employee's widow, which rested on a Finding that the crises in his heart trouble arose in substantial part from his work and the conditions under which he was working. At Page 868 the court stated: "Appellants state that the medical evidence as to the casual (probably causal) relationship between the exertion in climbing the ladder and the death fifteen minutes later, is conjectural." The court does not state that such causal relationship need not be established, but merely goes on to conclude that the evidence in this particular case was sufficient.

In the case of *Hampton Roads Stevedoring Co.* vs. *O'Hearne,* 184 F. 2nd, 76, the claimant struck his head against a deck beam on June 15, 1948, and died July 17, 1948. The deceased was disabled for all of said 32 days. Deceased had neurosyphilis and medical testimony was that this could have caused death or that the blow could have stirred up the syphilis symptoms. At Page 78, the court said: "- - - - but according to our view, there is substantial evidence tending to show that the blow either was the sole cause of the death,

or that it combined with the previously existing condition of the deceased, to hasten his death." It is to be noted here again, that nothing in this case states that the doctrine of proximate cause does not apply, or that no causal connection need be established.

Two other Federal Court cases have discussed the causal relationship questions in similar cases to the one presented here. In *International Mercantile Marine Company* vs. *Lowe, Deputy Commissioner,* 93 F. 2nd, 663, the cause of action arose under the Longshoremen's Act and the court said: "And Section 8A plainly provides for the right to compensation in case of disability. When death occurs, a new cause of action arises which requires an adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency."

The case of *Trudenich* vs. *Marshall,* 34 F. Supp. 486, was a case under the Longshoremen's Act. There, on January 2 and January 3, 1940, the employee was carrying heavy sacks, and felt a pain in his chest. Later he was found to have had an attack of coronary thrombosis. The employee was also suffering from angina pectoris. It was held there that the disability was not caused by the injury sustained by employee in the course of his employment, the court saying at Page 488: "Despite its liberality, the act does not allow compensation unless the injury flows from the employment as effect from cause." Thus it is said in *Ayers* vs. *Hoage,* 63 F. 2nd, 364, 365, "An injury arises out of 'the

employment within the meaning of the Compensation Act when it occurs in the course of the employment and as a result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincidental with the employment is not a sufficient basis for an award.' (Citing cases).

"In the Madore case (134 A. 259) the court said: 'Before he can make a valid award the trier must determine that there is a direct causal connection between the injury, whether it be the result of accident or disease, and the employment. The question he must answer is: Was the employment a proximate cause of the disability, or was the injured condition merely contemporaneous or coincidental with the employment? If it was the latter, there can be no award!' " Citing other cases).

At Page 489 in the Trudenich case the court said: "So, whether injury followed an unaccounted dizziness, (Citing cases), or pre-existing arteriosclerosis (Citing cases) or an enlarged heart, (Citing cases), or myocarditis (Citing cases) compensation was allowed when the exertion of the workmen accelerated or aggravated his condition, brought on an attack, or brought on other disease directly traceable to the pre-existnig condition."

Based upon the above it is respectfully submitted that the second injury in this case was caused by the

lack of care of applicant in exposing himself to an unreasonable risk having no connection with his employment. In no event can it be said that applicant's second injury "arose out of" his employment and was in the course of his employment. (U.S.C.A. Title 33 Sec. 902 (2))or was causally connected thereto.

Conclusion

From the above authorities it is established that appellants' statement on page 5 of its brief "Fault is Not a Factor in Compensation Law" is much too broad. A distinction must be drawn and is drawn between the negligence of an employee before and after the occurrence of the accident upon which the claim is founded. There is and should be no right to compensation for disability resulting from negligence on the part of the employee subsequent to the original injury. It is respectfully submitted that the subsequent injury in this case was the result of an independent intervening cause and could have been avoided by reasonable care. Since the compensation order of the Deputy Commissioner was not in accordance with law it was properly set aside by the District Court and the order of the District Court should be sustained.

Respectfully submitted,

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No. 13509.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Appeal From the United States District Court for the Southern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS CYR AND PILLSBURY.

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TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

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It is believed that appellants' opening brief covers essentially the matters discussed in appellees' brief except in the following points, which we desire to discuss briefly.

(1) Appellees quote (p. 2) from 58 American Jurisprudence, Workmen's Compensation, Section 200, page 709, as authority for the proposition that with respect to negligence as a contributing cause there is a distinction between the original injury and a second or consequential injury, the contention being that as to the original injury,

negligence of the employee is immaterial, but contributory negligence is a factor as to the second or consequential injury. It is to be noted however that the broad assertion in the quoted text is supported by *one* citation—and upon reading the cited case (*Kruchowski v. Swift,* 201 Minn. 557, 277 N. W. 15), it appears that it does not pertain to a second injury at all but to the refusal of the employee to accept medical treatment. Moreover it is to be noted that the same textbook states that the determination as to whether the second occurrence is causally related to the original injury is "one of fact" (*Id.,* Sec. 278, p. 775.)

(2) Appellees rely upon antiquated cases decided in the years 1915 and 1918 when compensation law was in its infancy and the courts were of the impression that common law tort concepts should be applied, an impression which has since been disavowed by all courts which have given careful consideration to the question. (*Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469, 481; *Burns S. S. Co. v. Pillsbury* (C. A. 9, 1949), 175 F. 2d 473; *N. L. R. B. v. Hearst,* 322 U. S. 120, 124, 127, 131; *O'Leary v. Brown-Pacific-Maxon Inc.,* 340 U. S. 504.) As an indication of the character of the cases cited by appellees, one of them, *Pacific Coast Casualty Co. v. Pillsbury* (1915), 171 Cal. 319, 153 Pac. 24, states that the Compensation Act "has not even attempted to provide compensation for such collateral [consequential] injuries * * * while he was engaged in his own affairs outside of and not connected with his employment." The more modern and opposing view point is stated in the cases cited on page 5 of appellants' opening brief.

(3) We deem it unnecessary to discuss those cases cited by appellees which do not pertain to consequential injuries. Among such cases are *Penn Stevedoring Corp. v. Cardillo*

(1947), 72 Fed. Supp. 991; *Ocean S. S. Co. v. Lawson,* 68 F. 2d 55. Since appellees state (p. 10), that we have not discussed the latter case, although "the trial judge relied heavily on this case in his decision" we shall discuss it here. The cited case did not involve a "consequential injury." The employee there *was not injured again.* In that case the employee's wound became infected and the question was whether that infection "naturally or unavoidably resulted from the accidental [original] injury" a requirement for compensation for infection under Section 2(2) of the Act, 33 U. S. C. A., Section 902(2). As stated Section 2(2) of the Compensation Act provides in substance that compensation for infection following an injury is payable *only if such infection naturally or unavoidably results from such injury.* The deputy commissioner in that case made no finding as to whether the infection naturally and unavoidably resulted from the injury; for this reason the Court *remanded the case to the deputy commissioner* to make such a finding "and then to reconsider the case." In the instant case there was a *second injury* and the deputy commissioner made a finding that the second injury was "directly attributable" to the original injury. In the *Ocean S. S.* case the question of the employee's negligence was involved because the statute expressly makes it material in the case of infections. As stated an infection following an injury is only compensable if it naturally or unavoidably results from the injury; *a fortiori* an infection is not compensable if it results from the injured employee's negligence. Because Congress provided special requirements for compensability for infections following an injury, it would seem that *other* consequential disabilities from the injury follow the usual pattern of compensability, namely that all disabilities which result from the injury are compensable whether

or not they are the natural, direct, proximate, predictable, foreseeable or immediate consequences of the injury.

It is therefore apparent that the *Ocean S. S. Co.* case and the instant case are dissimilar in facts, in the posture in which they come before the reviewing court and in the legal issues involved.

(4) In appellees' second point it is stated that the reviewing court is not bound to accept the findings of the deputy commissioner. The most recent pronouncement upon this point—by the Supreme Court—may be found in *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, 508. In that case the court said the findings of the deputy commissioner "are to be accepted [by the reviewing court] unless they are unsupported by substantial evidence on the record considered as a whole." This does not mean that the reviewing court should reweigh the evidence. See footnote 21 to the case of *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474. Accord: *U. S. F. & G. Co. v. Britton* (C. A. D. C. 1951), 188 F. 2d 674; *Cf. Pittston Stevedoring Corp. v. Willard* (C. A. 2, 1951), 190 F. 2d 267.

In a case subsequent to *O'Leary v. Brown, supra,* 340 U. S. 504, the Supreme Court cited with approval in *United States v. Oregon Medical Society,* 343 U. S. 326, 339, the quotation in *United States v. U. S. Gypsum Co.,* 33 U. S. 364, 395, as follows:

> "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

We believe that it may be conservatively stated that it is not correct to say that the reviewing court is not bound to accept the findings of the deputy commissioner.

(5) In point III appellees state that appellants' brief contains no "further discussion" of the question of the doctrine of causal relationship in compensation cases. On page 6 of our opening brief we stated that such terms as "proximate cause," "direct cause" and "sole cause" were not material in compensation law and that the courts have uniformly refused to apply them, citing 10 cases, including one United States Supreme Court case and a Law Review Article which we believed supported our statement. We also cited five cases (p. 6) which we believe supported our contention that a "concurring cause" is sufficient in compensation law to establish the right to compensation. We also cited four cases (p. 7), three United States Supreme Court cases and one from this court, which we believe support our statement that common law concepts as to cause and effect have no place in the administration and application of compensation law. We also referred (p. 7) to Section 4(d) of the Compensation Law, 33 U. S. C. A., Section 904(d), where it is provided that "compensation shall be payable *irrespective of fault as a cause* for the injury."

It is difficult to imagine what further discussions of the doctrine of casualty in compensation law should be required.

(6) Appellees' brief concludes in substance, that since fault is a factor in compensation law, Section 4 of the

or not they are the natural, direct, proximate, predictable, foreseeable or immediate consequences of the injury.

It is therefore apparent that the *Ocean S. S. Co.* case and the instant case are dissimilar in facts, in the posture in which they come before the reviewing court and in the legal issues involved.

(4) In appellees' second point it is stated that the reviewing court is not bound to accept the findings of the deputy commissioner. The most recent pronouncement upon this point—by the Supreme Court—may be found in *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, 508. In that case the court said the findings of the deputy commissioner "are to be accepted [by the reviewing court] unless they are unsupported by substantial evidence on the record considered as a whole." This does not mean that the reviewing court should reweigh the evidence. See footnote 21 to the case of *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474. Accord: *U. S. F. & G. Co. v. Britton* (C. A. D. C. 1951), 188 F. 2d 674; *Cf. Pittston Stevedoring Corp. v. Willard* (C. A. 2, 1951), 190 F. 2d 267.

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It is difficult to imagine what further discussions of the doctrine of casualty in compensation law should be required.

(6) Appellees' brief concludes in substance, that since fault is a factor in compensation law, Section 4 of the

Act to the contrary notwithstanding, and since the court below [not the deputy commissioner] made a finding that the employee was at fault, the order of the court below should be affirmed.

As indicated in our opening brief, if fault is a factor, the finding as to fault belongs with the deputy commissioner and not with reviewing court. (*Marshall v. Pletz,* 317 U. S. 383, 388.) This was recognized even in the case of infections where fault presumably is made a factor by express provision of the statute. See *Ocean S. S. Co. v. Lawson, supra,* 68 F. 2d 55, relied upon by appellees and the court below.

Finally, even if fault were a factor in the instant case, the finding of the deputy commissioner to the effect that the second injury was directly attributable to the first injury by implication ruled out that the employee's fault was the cause of the second injury. See concurring opinion in *Head Drilling Company v. I. A. C.,* 177 Cal. 194, 170 Pac. 157 (cited by appellees, pp. 7 and 8 of their brief), where the court said that the finding of the Commission is in effect a finding that at the time of the second accident the employee was not negligent. *Cf. Sweeting v. American Knife Company,* 123 N. E. 82, 226 N. Y. 200, where Judge Cardozo states that the findings of a deputy commissioner should not be required to have the completeness of a pleading under code practice. Accord: *Monhat v. Board of Public Education,* 48 A. 2d 20, 159 Pa. Super. 423; *Texas Employers Ins. Ass'n v. Sheppard,* 42 Fed. Supp. 669.

The above reasoning is particularly applicable where as in the instant case no issue was raised before the deputy commissioner as to the injured employee's negligence and hence there was no occasion for the deputy commissioner to make a finding with reference thereto. Issues may not be raised for the first time upon judicial review. (*Moore Dry Dock v. Pillsbury, Deputy Commissioner* (C. A. 9, 1948), 169 F. 2d 988; *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.* (1941), 314 U. S. 244; *Maryland Casualty Company v. Cardillo, Deputy Commissioner, and Mary Najjum* (App. D. C., 1939), 107 F. 2d 959; *Southern Shipping Co. v. Lawson, Deputy Commissioner* (Fla., 1933), 5 Fed. Supp. 321; *Metropolitan Casualty Insurance Co. v. Hoage, Deputy Commissioner* (1937), 67 App. D. C. 54, 89 F. 2d 798; *Liberty Stevedoring Co., Inc. v. Cardillo, Deputy Commissioner* (N. Y., 1937), 18 Fed. Supp. 729; *Grain Handling Co., Inc. v. McManigal, Deputy Commissioner* (N. Y., 1938), 23 Fed. Supp. 748; *State Treasurer v. West Side Trucking Co.,* 198 App. Div. 432, affirmed 233 N. Y. 202, 135 N. E. 544; *Burmester v. DeLucia* (1934), 263 N. Y. 315, 189 N. E. 231; *Bethlehem Steel Co. v. Parker, Deputy Commissioner* (C. A. 4, 1947), 163 F. 2d 334.

Conclusion.

In view of all the above it is respectfully submitted that the finding of the deputy commissioner to the effect that the second injury to the employee's leg was directly attributable to the first injury is supported by evidence

in the record considered as a whole and should be sustained. The order of the court below setting aside the compensation order was erroneous and should be reversed.

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No. 13512

United States
COURT OF APPEALS
for the Ninth Circuit

CLAUDE A. TAYLOR,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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TABLE OF CASES

No. 13512

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CLAUDE A. TAYLOR,

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INTERSTATE COMMERCE COMMISSION,

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APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

PRELIMINARY STATEMENT

This is an appeal from a judgment and order of injunction rendered by the District Court for the District of Oregon on July 16, 1952 arising out of an action brought by the Interstate Commerce Commission against the appellant bearing Civil No. 6206 (T.R. pp. 24-27). The complaint and answer in the said action were superseded by a Pre-Trial order dated February 18, 1952 (T.R. pp. 3-16) and the action was tried on

the basis of said order. The jurisdiction of the District Court is based upon Section 222(b) of the Interstate Commerce Act (Title 49 U.S.C.A. Section 322 (b)) on the basis that it is contended by the appellee that the appellant is a carrier subject to the provisions of that Act and has violated the same by operating as such carrier and so continues to operate without procuring a certificate of public convenience and necessity therefor. This Court has jurisdiction of this appeal pursuant to the provisions of Title 28, Section 1291, U.S.C.A. The Pre-Trial order in the court below (T.R. pp. 3-16) sets forth the facts upon which the appellee contends that the court below has jurisdiction of the subject matter of this action.

The appellant is an individual residing at Canby, Oregon, engaged in the business of buying and selling lumber. Appellant receives orders from his customers who are retail dealers primarily in Idaho and purchases the lumber to fill these orders from various mills located in the State of Oregon. Appellant transports the lumber thus purchased by him, to his customers in trucks owned by appellant and operated by his employees. The appellant charges his customers a delivered price for the lumber and no separate statement of transport charge is made nor are bills of lading or other shipping documents issued. It is conceded by appellee that:

> "The absolute and bona fide title to the lumber purchased by the defendant passes to the defendant as soon as he takes delivery at the origin mill site, that he assumes the responsibility for any damage or loss to the same thereafter until delivery." (T.R. p. 8)

It is also admitted that appellant has no lumber yard nor does he carry any stock pile of lumber. The sole question before the court below and this Court is whether the appellant is a "contract carrier by motor vehicle" under the provisions of the Interstate Commerce Act (Sec. 203, Par. 15, I.C.A., Title 49 U.S.C.A., Sec. 303 (15)) or is a "private carrier of property by motor vehicle" (Sec. 203, Par. 17, I.C.A.) (Title 49 U.S. C.A., Sec. 303 (17)).

ASSIGNMENTS OF ERROR

The court below has erred in the following particulars:

I. The District Court was in error in making the findings contained in the first sentence of Finding of Fact III (h) (T.R. p. 21) reading as follows:

> "Taking all of the shipments as a whole, the net sum accruing to the defendant on lumber sales is an amount which compares favorably with transportation charges of duly authorized carriers for similar shipments based upon the published rates per thousand board feet or a mileage basis."

inasmuch as said finding is not sustained by any competent evidence.

II. Even if the portion of the District Court's finding set forth in Specification of Error No. 1 above is correct, the District Court was in error in making the finding contained in paragraph VII of the Findings of Fact (T.R. p. 22).

III. The court below was in error in its Conclusions of Law II, III, IV, V (T.R. pp. 22, 23, 24) in that all of said Conclusions are not based on any findings of fact. Insofar as said Conclusions may be based on findings of fact, said findings are not based upon any substantial or relevant evidence and as a matter of fact are contrary to some of the findings.

IV. The court below was in error in its oral opinion (T.R. p. 17) wherein it held that this case was similar to *Stickle v. Interstate Commerce Commission,* 128 F. (2d) 155, since there are very vital and distinguishing differences between the case at bar and the *Stickle* case, supra.

V. The court below was in error in issuing the judgment and order of injunction appealed from because the plaintiff has not sustained the burden of proof necessary for the issuance of such a judgment and order.

ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR I, II, and III

Summary

An analysis of the transactions upon which the appellee relies shows that in no single transaction is the carrier rate and the difference between appellant's buying and selling delivered price identical and the District Court has found that on individual shipments "there is considerable variation between the tariff rate and the difference between the defendant's buying and selling price" (T.R. p. 21). Averaging the twenty shipments upon which the appellee relies as suggested by the District Court in Finding No. IV (h) (T.R. p. 21) indicates that there is approximately a 6.7% difference between the average of the common carrier tariff rates and the average of the difference between the appellant's buying price and delivered selling price of his lumber. With such a difference shown on an arithmetical basis, it cannot be said that the averages compare favorably. Even if it be held by this Court that a 6.7% difference in the averages is not material it is submitted that a comparison of averages is irrelevant and erroneous in view of the great disparity in the individual transactions.

Body of Argument

This case was in effect tried on a stipulation of facts as both parties agreed upon certain transactions which they agreed were typical of appellant's activities during the period in question (T.R. pp. 15, 35). Such transac-

tions were described in plaintiff's Exhibit 1 which set forth the details of twenty shipments. Defendant submitted an exhibit designated as defendant's Exhibit 1 which summarized the same transactions and two others. By stipulation of the parties it was agreed that the transactions included in both Exhibits which as stated above are identical with the exception of two additional transactions shown in defendant's Exhibit 1, indicate typical transactions (T.R. p. 15). No other evidence of appellant's transactions was submitted and appellee's case must stand or fall on the inferences to be derived from the two exhibits.

For the convenience of this Court there is set forth herein as an Appendix and designated as Appendix A, Columns 3 and 4 of plaintiff's Exhibit 1 together with certain other data hereinafter mentioned, and as Appendix B, defendant's Exhibit 1 together with certain additional data as hereinafter described.

It is respectfully submitted that the key to the case will be found in a careful analysis of plaintiff's Exhibit 1 (Appendix A) and defendant's Exhibit 1 (Appendix B) in the light of the agreed facts in the Pre-Trial Order.

The rationale of the appellee's case is that the difference between what the defendant pays for his lumber at the mill and what he receives for its delivery to his customers closely approximates what a carrier for hire would receive based upon the applicable tariff. While the defendant does not concede that even if that were so in this case, the appellee would be entitled to succeed, it is quite obvious that if the appellee's contention is not

factually correct, the respondent cannot succeed and the appellee has impliedly so admitted. What, therefore, does an analysis of this exhibit show?

1. The first striking fact to be deduced from the exhibit is that in not one of the 22 typical cases described in defendant's Exhibit 1 (Appendix B) is the difference between the defendant's buying price and his selling price exactly equal to what a carrier for hire would receive based upon the applicable tariff.

2. Of the 22 cases in defendant's Exhibit 1 (Appendix B) there were nine instances in which the difference between the defendant's purchase price and his selling price was more than the cost of transportation at the applicable tariff rate and in 13 cases the difference between the purchasing price and selling price was less than the applicable tariff rate.

3. Further analysis of defendant's exhibit indicates that in nine of the typical 22 cases there was a difference between the applicable tariff cost of transportation and the spread between the defendant's buying and selling price of less than ten percent of the carrier cost of transportation, in five cases the difference was between 10 and 19% of the carrier cost of transportation, in 4 cases the difference was between 20 and 29%, in 2 cases the difference was between 30 and 39% and in 2 cases the difference was between 40 and 49%.

4. In summary it should be noted that in almost sixty percent of the typical cases shown in defendant's Exhibit 1 there was a difference of more than 10% between the compensation the defendant would have re-

ceived as a carrier hauling under a carrier tariff and what the appellant actually received as a lumber dealer. For the convenience of the Court, the appellant has indicated on Appendix B the percentage of difference between the compensation the appellant would have received as a carrier hauling under a carrier tariff and what the appellant actually received as a lumber dealer applied to the common carrier charges. Said percentages will be found in the last column of defendant's Exhibit which is designated Appendix B attached to this brief.

5. The plaintiff has also submitted an exhibit to the Court based upon the same typical examples (plaintiff's Exhibit 1) although the appellee has only analyzed 20 of said transactions. Columns 3 and 4 of this exhibit, are headed "Published Tariff Truck Rate" which purports to show the published tariff truck rate and as "Taylor's Net Rate", which is the difference between the appellant's purchasing price and selling price divided by the number of thousand of board feet of lumber involved in the transaction. The appellee attempts to relate the published common carrier rate to the figure indicated as "Taylor's Net Rate". For the convenience of the Court, we have attached to this brief as Appendix A, columns 3 and 4 of plaintiff's Exhibit 1, together with the percentage of difference between each of the items contained in the said columns. An analysis of these percentages will also show that in almost 60% of the cases the percentage of difference exceeds 10% and in some instances is in excess of 40%.

When in almost 60% of the cases the variance between the defendant's net revenue and the common car-

rier rate exceeds 10% there is certainly no factual basis for the District Court's Finding of Fact No. VII (T.R. p. 22).

The truth is that there is no consistent pattern of relationship to carrier rates. The figures as shown in the exhibits are entirely consistent with the appellant's contention that his prices depend upon the ebb and flow of the lumber market and the cost of transportation is merely one factor and in many cases an insignificant factor in determining the price at which he sells his merchandise. *Not only are the figures consistent with appellant's contention, but they are consistent with any other theory in view of the wide variation in many instances between carrier rate and the difference between the appellant's buying and selling price.*

The District Court in Finding IV (h) has found in effect that the position of the appellant with respect to such lack of consistency in individual transactions is correct. However, the court has taken another step in the process of analysis and has found that if the average of the tariff rates involved is compared to the average of the difference between appellant's buying price and delivered selling price, the amounts "compare favorably" (T.R. p 21). This finding is the only one made by the court to support its legal conclusions which in any way might be considered as somewhat inconsistent with the position of the appellant that it is in the lumber business and transports its own lumber to its customers in the ordinary course of business. It is respectfully submitted with reference to such finding:

1) It is factually incorrect.

2) If it is factually correct it is legally irrelevant.

An analysis of the plaintiff's Exhibit 1 (Appendix A) shows that the total of the column entitled "Published Tariff Trucking Rate" is $543.68 and the total of the column headed Taylor's net rate which represents the difference between appellant's buying price at the milling and selling price delivered to his customers is $509.36. Dividing each of said totals by twenty which is the number of transactions set forth in the plaintiff's Exhibit 1 (Appendix A), we find that the average published tariff truck rate is $27.18 and the average of the column entitled Taylor's net rate is $25.46. The difference between the two figures is $1.72. If we divide the figure of $1.72 by $25.46 we find the result to be 6.7%. Thus the difference between the average of the tariff rates and the spread between appellant's buying price at the mill and the delivered price is 6.7% which, it is submitted, is a material difference.

However, even if this Court disagrees with the contention of appellant that the amount of difference is material it is submitted that the use of an average for this purpose is completely irrelevant and erroneous. An average as a statistical measure is an artificial figure in most cases having no significance and does not give very much information about the matter in question. Thus it is quite obvious that if it is desired to learn something about the income of several individuals an average of such incomes is of little significance because if we assume that one person has an income of $50,000 per year,

another of $5,000, and another of $1,000, the average of $18,666 is a figure which tells us nothing. Furthermore there is no legal authority for the use of averages as a means of comparison in this situation. In the *Stickle* case which is the basic authority upon which the appellee and trial judge relied the court found that the difference in each transaction "approximated the amount the carrier who had complied with Part II of the Interstate Commerce Act and has a certificate of necessity would charge for transporting the same lumber." 128 F. (2d) 159. The District Court in this case has made a finding which is directly contrary to the one in the *Stickle* case with respect to each transaction but justifies its position by making use of the artificial device of averaging a group of disparate figures which still results in a substantial difference.

ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR IV and V

Summary

The basic legal authority for appellee's position is *Interstate Commerce Commission v. Stickle,* 128 F. (2d) 155. On the other hand there are three cases in the Federal Courts wherein persons in the position of the appellant have prevailed in similar situations: *Interstate Commerce Commission v. Tank Car Oil Company,* 151 F. (2d) 834; *Interstate Commerce Commission v. Clayton,* 127 F. (2d) 967; *Brooks Transfer Company v. U. S.,* 93 F. Supp. 517, aff. 340 U.S. 934, 71 Sup. Ct. 501. The appellant submits that the facts at bar are not at all comparable to the facts found in the *Stickle* case but are similar to the cases decided in favor of the defendants above cited.

Body of Argument

The question to be decided by the Court in this case is whether the facts in this case at bar bring it within the doctrine of the *Stickle* case or within those cases exemplified by the *Brooks,* the *Clayton,* and the *Tank Car Oil Company* cases above cited.

The basic facts as found by the District Court in the *Stickle* case are as follows (128 F. (2d) 159).

1. That Stickle was "primarily engaged in the transportation of lumber for compensation under individual contracts with its customers; that the amount which

Stickle received from the customer for the lumber and transportation thereof in excess of the amount Stickle pays the mill for the lumber, *approximates* the amount a carrier who has complied with Part II (of the Interstate Commerce Act), and has a certificate of convenience and necessity, would charge for transporting the same lumber; that the transportation by Stickle is not an incident to a commercial enterprise; and that, on the contrary, the buying and selling of lumber is a *means and device* employed by Stickle to enable it to engage in the transportation of lumber as a contract carrier without *complying* with the provision of Part II (of the Interstate Commerce Act) respecting common carriers and contract carriers"

The court therefore held that there was a violation of the Interstate Commerce Act.

It is to be noted in this case that there was a very vigorous and cogent dissenting opinion written by Circuit Judge Huxman so that the decision of the court was very closely divided and was based upon certain findings which are not present in the case at bar. It is also to be noted that the court paid much attention to the fact that the price of lumber paid by Stickle, plus the cost of transportation which would have been charged by a certificated carrier approximated the amount received by Stickle. *That fact is entirely absent in this case* as is shown by the "Argument" in support of Assignments of Error I, II and III in this brief.

It is furthermore noted that the court found that the taking of title by Stickle in that case was a "means and

device" used to evade the purposes of the Interstate Commerce Act. In this case no such question has been raised, and it is conceded that the defendant actually took title to the property and had all the risks incident to such ownership. (See Paragraphs IX and XII, pre-trial order, T.R. pp. 7, 8.)

Another very important distinction between the facts of the *Stickle* case and the facts in the case at bar will be found in the statement of facts as set forth in the Circuit Court of Appeals of the Tenth Circuit in 128 Fed. (2d) at page 157. According to the court:

> "Stickle and Company circulated quotations of its prices on various grades, sizes and classes of lumber to numerous prospective purchasers. Until about the time of the trial below, such prices were quoted both on the basis of acceptance of the lumber by purchasers at the mill and on a delivered basis. It set up a schedule of payments to be added to the f.o.b. mill prices for delivery to the customer. The average load approximates 10,300 board feet. Payments to be added to the f.o.b. mill prices were originally listed on a schedule of *'trucking rates'*, the rates varying as to points of delivery. Upon advice of counsel and after an investigation was initiated by the Interstate Commerce Commission, Stickle and Company changed the designation of this schedule to "Schedule of Advance Payments" or "Advances to Driver." (Emphasis supplied)

In the case at bar there was never any distinction made between the f.o.b. prices to defendant's customers or delivered prices. The price to the customer was never divided in any manner and there was never any difference in price as between customers based upon the mileage to be transported solely. The market factors were

the dominant, and in many cases the only differentiating factor in determining the price to the customer. This is shown by the fact that the customer did not know the source of the lumber and agreed to pay the price for the lumber regardless of where the lumber originated. (See paragraphs X and XI of the pre-trial order, T.R. p. 8.) As will be noted in the court's opinion in the *Stickle* case these factual distinctions are very vital.

Two other cases are found in the reports which grant the plaintiff relief in a situation alleged to be similar to the case at bar. The first of these is *Interstate Commerce Commission v. Pickard* in the District Court for the Western District of New York, 42 Fed. Supp. 351. This case involved a situation where the defendant allegedly leased his truck to a furniture manufacturing company which then proceeded to transport its own merchandise to its customers. This case turned upon the fact that as found by the court, the lease was a mere subterfuge and that actually control of the truck and drivers was at all times in the defendant. There was no claim made in that case that the defendant was actually engaged in the furniture business nor was there any evidence to indicate any bona fide sale by the defendant of merchandise owned by it to its customers. The factual situation as will be shown by an analysis of the report was entirely different and the case cannot be used as any authority under the state of facts before the Court.

Another case which is reported wherein the plaintiff has prevailed is in the case of *Interstate Commerce*

Commission v. Jamestown Sterling Corporation, 64 Fed. Supp. 121. This case arose out of the same facts as the *Pickard* case above cited and in that case, as shown by the report at 64 Fed Supp. 123:

> "The transportation by this defendant was incidental to its manufacturing business and the amount of compensation for transportation is identifiable."

It appeared in that case that the identifiable portion of compensation received was the same as that which would have been allowed to a common carrier under the applicable tariff. As stated by the court (64 Fed. Supp. 123):

> "The gravamen of the situation rests in the fixation of charges upon a rate allowed by the Interstate Commerce Commission."

It thus appears that the *Jamestown Sterling* case differs very greatly from the case at bar and cannot be used as authority in this situation.

On the other hand, the cases wherein the defendant has prevailed in this situation would seem to be on all fours with the situation of the case at bar. Thus, this case is very close factually to the case of *Interstate Commerce Commission v. Tank Car Oil Corp.,* supra. In that case the defendant was the owner of motor trucks used by it for transportation of gasoline in connection with its wholesale gasoline business. The District Court for the Northern District of Georgia in the decision in the lower court stated:

> "The plaintiff fails to show by a preponderance of the evidence that as to any transaction there was

other than a bona fide sale of gasoline f.o.b. the purchaser's station in which the purchaser was buying gasoline and was not concerned in the price or cost of transportation." 60 Fed. Supp. 135.

That is exactly the situation here as is shown by the admitted facts in the Pre-Trial order. The Court of Appeals in affirming the District Court (151 Fed. (2d) 834) distinguished the situation of the defendant in that case from the contract or common carrier situation as follows: (1) The defendant bought the gasoline, paying out its own money at the time of delivery to its trucks. (2) It ran the risk not merely of the loss of freight charges, but the loss of gasoline as well in the event of destruction of its trucks enroute by fire or other casualties. (3) It ran the risk of the purchasers' failure to pay for the gasoline after delivery to purchasers who fail to pay on delivery. (4) It ran the risk of the failure or refusal of purchaser to accept delivery of the gasoline after transportation to the purchaser's place of business, such as might be occasioned by the death of the purchaser, failure of his business or the destruction by fire or other casualties. (5) The appellee assumed all risks that might be occasioned by an act of God prior to the delivery of gasoline to the purchaser, whereas a carrier under the common law would ordinarily not assume such risk or loss to its cargo. (6) The carrier bases his charges ordinarily upon the distance which he hauls the commodity, whereas the appellee bases his charges upon the market price in the community without regard to the source from which it has obtained and transported the gasoline.

In this case all of the distinguishing characteristics mentioned by the Court of Appeals as above quoted appear in the Pre-Trial order and in the testimony. There is no dispute that all of the attributes which the court holds to be important in deciding a similar case are in favor of the appellant in this case, and this Court should follow the reasoning of the Court of Appeals of the Fifth Circuit as set forth above. (Paragraphs IV (3, 5, 6, 9, 11, 12, 13), VIII, IX, X, XI, XII of Admission of Fact, Pre-Trial Order, T.R. pp. 5-8.)

Another case very similar factually to the case at bar is *Interstate Commerce Commission v. Clayton,* supra, cited by the Court of Appeals, Tenth Circuit; the same circuit which decided the *Stickle* case. In this case the defendant was charged with holding himself out as a common or contract carrier of coal. The decision in this case was written by Judge Phillips, who also wrote the opinion in the *Stickle* case. The rationale of Judge Phillips' opinion is contained in 127 Fed. (2d) 967 at 969 wherein the Judge states with respect to the defendant:

> "He has indulged in no subterfuge or design to avoid the requirements of Part II of the Interstate Commerce Act. The cost of the coal and transportation is $5.57 per ton. He sells it for $8.50 per ton. Thus he realized a profit both from the transportation and from the sale of the coal, the margin of profit being large enough to cover both."

So in this case the defendant sells his lumber at a price which in most instances is high enough to cover the cost of transportation plus a reasonable profit for his risk

and other services which he admittedly renders to his customers.

The most recent case on the subject is *Brooks Transportation Co. v. United States,* 93 Fed. Supp. 517, affirmed by U. S. Supreme Court February 26, 1951, 340 U.S. 934 (No. 525), 71 Sup. Ct. Reports p. 501. In that case the District Court which was affirmed by the Supreme Court used the good faith test. The court in that case held that where the purchase and sale was bona fide and title actually passed to the defendant that the defendant was a private carrier and not subject to regulation. The test apparently, according to the court, was whether actual bona fide title passed or only a purported or false title apparently passed to the defendant. The court made much of the quotation from Commissioner Joseph B. Eastman's statement before the Committee on Interstate Commerce, U. S. Senate 99 Fed. Supp. 524. As the court quoted Commissioner Eastman:

> "Well, I was going to say that in instances where the trucker actually buys the product which he transports, that is a bona fide transaction and not merely a device to evade regulation, he would be a private carrier."

Using that test in this case, based upon the admission in paragraph IX (T.R. pp. 7, 8) of the Pre-Trial order, would leave this Court no alternative but to hold that this appellant is a private carrier according to the definition of the statute and therefore is not subject to regulation.

The Interstate Commerce Commission being the plaintiff in this action has the burden of proof. It is sub-

mitted that it has failed to sustain that burden. (See *Interstate Commerce Commission v. Tank Car Oil Corp.*, supra.)

FOR THE FOREGOING REASONS THE JUDGMENT AND ORDER APPEALED FROM SHOULD BE REVERSED AND THE COMPLAINT HEREIN DISMISSED.

Respectfully submitted,

HICKSON & DENT,
SEYMOUR L. COBLENS,
Attorneys for Appellant.

APPENDICES

APPENDIX A

Published Tariff Truck Rate	Taylor's Net Rate	Percentage of Difference Between Published Tariff Truck Rate as Shown on Plaintiff's Exhibit I
27.77	24.50	—8
25.92	36.91	+42
29.15	26.10	—10
25.01	27.55	+9
26.82	21.52	—21
35.13	25.23	—28
35.13	23.78	—31
26.33	26.30	—1/10
20.87	21.60	+3
30.99	25.30	—18
19.03	19.79	+4
21.79	22.05	+01
29.15	25.48	—12
25.01	24.32	—5
20.41	24.50	+16
23.63	25.48	+7
20.87	26.72	+28
25.87	15.10	—40
35.13	26.95	—23

APPENDIX B

EXHIBIT, showing Mileage, Motor Carrier and Rail Rates, Motor Carrier Freight Charges Net Cost, Net Cost plus Motor Carrier Freight charges, Net Cost plus 23¢ per traveled mile and Net selling price covering shipments of Lumber and Plywood moving from points in Oregon to points in Idaho and Utah. Also showing profit and loss based on motor carrier charges and/or on 23¢ per traveled mile. All rates are in cents per 1000 feet board measure except those bearing symbol Ø which are in cents per one hundred pounds and except as otherwise noted rates named will be found in Item No. 2850, Willamette Tariff Bureau, Inc., Agent, Tariff No. 5, M.F.-I.C.C. No. 2

Shipper	Invoice Date	Invoice No.	From	To	Mileage	Truck Rate	Rail Rate	Cost of Transportation @ 23¢ per traveled mile	Freight Charges via Motor Carrier	Net Cost	Net Cost plus Motor Carrier Freight	Net Cost plus 23¢ par traveled mile	Net selling price	Difference between net cost plus Mtr. Carrier Frt. Chgs. and selling price: Profit	Difference between net cost plus Mtr. Carrier Frt. Chgs. and selling price: Loss	Difference between net cost plus 23¢ per traveled mile and selling price: Profit	Difference between net cost plus 23¢ per traveled mile and selling price: Loss	Percentage of Differing
Lumber Products	10/10/50	101	Eugene, Ore.	Gooding, Ida.	1 553	2777	82	$254.58	$438.57	$1144.99	$1583.56	$1399.37	$1531.92		51.64		$132.55	- 12
Caldwell Lumber Co.	7/6/51	107-851	Cottage Grove, Ore.	Mt. Home, Ida.	2 514	2592	82	236.44	414.88	519.40	934.28	755.84	1110.00	$175.72		354.16		+ 42
Bradford Lumber Co.	7/18/50	-	Springfield, Ore.	Twin Falls, Ida.	2 586	2915	82	269.56	496.66	868.44	1365.10	1138.00	1288.96		$ 76.14	150.96		- 15
Young Lumber Co.	9/18/50	3632	Eugene, Ore.	Mt. Home, Ida.	3 492	2501	82	226.32	409.01	893.28	1302.29	1119.60	1343.89	41.60		224.29		+ 10
Lowes Lumber Co.	7/20/51	-	Molalla, Ore.	Mt. Home, Ida.	11 531	2682	82	244.26	409.36	836.07	1245.43	1080.33	1242.90		2.53	162.57		-1/2
Pope & Talbot	11/24/50	OLW44	Oakridge, Ore.	Blackfoot, Ida.	4 712	3513	82	327.52	642.91	1165.78	1808.69	1493.30	1627.60		181.09	134.30		+ 28
Pope & Talbot	9/30/50	1757	Oakridge, Ore.	Blackfoot, Ida.	4 712	3513	82	327.52	622.57	1491.24	2113.81	1818.76	1912.60		201.21	93.84		+ 33
Pope & Talbot	9/16/50	1613	Oakridge, Ore.	Ogden, Utah	5 830	4019	82	(381.80	361.71)	916.18	1277.89)		1207.74)					
Campbell-McLean	9/15/50	97	Eugene, Ore.	Ogden, Utah	9 787	Ø218	82	(	510.12)	1862.00	2372.12)	3159.98	/2288.00)		154.27	335.76		+ 30
Acme Lumber Co.	6/16/50	1802	Estacada, Ore.	Boise, Ida.	6 468	2633	69	215.28	320.62	775.68	1096.30	990.96	1095.93		.37	104.34		-1/10
Freres Frank Lumber Co.	8/22/50	2319	Lyons, Ore.	Nampa, Ida.	7 409	2087	82	188.14	339.49	1275.34	1614.83	1463.48	1626.70	11.87		163.22		+ 6
Idanha Lumber Co.	11/1/50	2457	Idanha, Ore.	Arco, Ida.	8 621	3099	no rail	284.66	554.81	1140.43	1695.24	1425.09	1593.36		91.88	168.27		- 16
Campbell-McLean	11/1/50	599	Eugene, Ore.	Arco, Ida.	9 621	Ø127	82	284.66	482.60	2807.90	3290.50	3092.56	/3286.40		4.10	183.84		- 01

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Idanha Lumber Co.	10/31/50	2278	Idanha, Ore.	Caldwell, Ida.	10 367	1903	no rail	$168.82	$321.85	$1227.31	$1549.16	$1396.13	$1562.07	$ 12.91		$165.94		+ 4
Fall Creek Lumber Co.	11/12/47	-	Fall Creek, Ore.	Caldwell, Ida.	3 426	2179	82	195.96	440.83	1239.15	1679.98	1435.11	1685.24	5.26		250.13		+ 1
Fall Creek Lumber Co.	3/5/48	-	Fall Creek, Ore.	Buhl, Ida.	3 586	2915	82	269.56	510.62	1133.00	1643.62	1402.56	1579.33		$ 64.29	176.77		- 12
Blue River Lumber Co.	6/6/49	1790	Eugene, Ore.	Mt. Home, Ida.	3 492	2501	82	226.32	500.83	902.18	1403.01	1128.50	1389.15		13.86	260.65		- 2
Al Clemente Lumber Co.	6/22/49	-	Eugene, Ore.	Weiser, Ida.	3 398	2041	82	183.01	367.38	617.40	984.78	800.41	1058.40	73.62		257.99		+ 20
Lorane Valley Lumber Co.	7/6/49	693	Cottage Grove, Ore.	Boise, Ida.	2 469	2363	82	215.74	410.73	817.65	1238.38	1033.39	1260.53	22.15		227.14		+ 5
Mt. Vernon Lumber Co.	8/15/49	417	Springfield, Ore.	Homedale, Ida.	3 410	2087	82	188.60	327.28	869.40	1196.68	1058.00	1288.49	91.81		230.49		+ 27
Fall Creek Lumber Co.	1/12/51	-	Fall Creek, Ore.	Boise, Ida.	3 455	2587	82	209.30	347.68	1041.60	1389.28	1250.90	1243.54		145.74		$7.36	- 41
Pope & Talbot	3/20/51	-	Oakridge, Ore.	Blackfoot, Ida.	4 712	3513	82	327.52	591.20	824.62	1415.82	1152.14	1278.17		137.65	126.03		- 23
J. B. Brown	4/3/51	-	Cottage Grove, Ore.	Blackfoot, Ida.	2 757	3967	82	348.12	476.04	870.24	1346.28	1218.36	1352.40	6.12		134.04		+ 2

1/ U.S. Highways 28, 20, 30 and Idaho State Highway 24
2/ U.S. Highways 99, 28, 20 and 30
3/ U.S. Highways 28, 20 and 30
4/ Ore. State Highway 58 and U.S. Highways 97, 20 and 30
5/ Ore. State Highway 58 and U.S. Highways 97, 20 and 30
6/ Ore. State Highway 211 and 50, and U.S. Highways 97, 20 and 30
7/ Ore. State Highway 222, and U.S. Highway 20
8/ Ore. State Highway 222, U.S. Highway 20 and 30, and Idaho State Highway 27
9/ Rate as named in Pacific Inland Tariff Bureau Tariff No. 10-A, M.F.-I.C.C. No. 6 and Tariff No. 28, M.F.-I.C.C. No. 12.
10/ Ore. State Highway 222, and U.S. Highways 20 and 30
11/ Ore. State Highway 215, and U.S. Highways 20 and 30
/ Plywood

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No. 13512

In the United States Court of Appeals for the Ninth Circuit

CLAUDE A. TAYLOR, Appellant,
vs.
INTERSTATE COMMERCE COMMISSION,
Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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GLASS-KEYSTONE PRESS

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CASES CITED

STATUTES CITED

In the United States
Court of Appeals
for the Ninth Circuit

No. 13512
CLAUDE A. TAYLOR, Appellant,
vs.
INTERSTATE COMMERCE COMMISSION,
Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

I

PRELIMINARY STATEMENT

By Findings of Fact and Conclusions of Law made and entered on the 16th day of July, 1952, the District Court found that appellant was engaging in the business of a contract carrier in the transportation of lumber by Motor Vehicle in interstate commerce on public highways, for compensation, without there being then and there in force, with respect to said defendant, a permit issued by the Interstate Commerce Commission authorizing said defendant to engage in such business; that said acts of defendant were

and are in violation of Sections 209(a) and 222(a), Part II of the Interstate Commerce Act.

Pursuant thereto the court entered a Judgment and Order for Injunction enjoining and restraining the defendant from further engaging in the described operations until such time as proper authority was issued by the Interstate Commerce Commission.

The order further provided that in event of appeal within 15 days from the date of entry thereof, the injunction shall be stayed during the pendence of such appeal.

Defendant has duly appealed from this Judgment and Order of Injunction.

II

JURISDICTION

Jurisdiction of the District Court is invoked under Sections 204(a) and 222(b), Part II of the Interstate Commerce Act. (Title 49, U.S.C. 304(a) and 322(b).) Jurisdiction of the Circuit Court of Appeals is invoked under the provisions of Title 28, U.S. Code, Section 1291.

III

STATUTES AND REGULATIONS INVOLVED

See Appendix I as follows:

Item 1—Section 203(a) (49 USC 303(a))
Item 2—Section 206(a) (49 USC 306(a))
Item 3—Section 209(a) (49 USC 309(a))

IV

STATEMENT OF THE CASE

The case was submitted to the District Court substantially upon a Pre-Trial order dated February 18, 1952 (Tr. 3-16). However, appellant's statement (app. Br. 1-2) that "the case was tried on the basis of said order" is not wholly correct. As to disputed contentions, contained in the Pre-Trial order, trial was had and testimony of witnesses for both appellant and appellee was adduced.

A summary of the facts as contained in the Pre-Trial Order and from the testimony of record is: The appellant is an individual residing at Canby, Oregon. He owns and operates 3 flat-bed truck-trailer units of motor vehicle equipment. In 1943 he was issued a permit by the Public Utilities Commission of Oregon authorizing the transportation of logs, poles, piling and lumber within the state of Oregon (Tr. 4). He still holds this permit and in 1950 he grossed a transportation revenue of $14,335.68 for hauling lumber and related products in intrastate commerce. (Tr. 7). Between March, 1947, and October, 1949, he owned and operated the Canby-Aurora Truck Service, an Interstate carrier, under a certificate issued by the Interstate Commerce Commission. (Tr. 4). Beginning 1947, and continuing at the present time, appellant also engaged in "buying" lumber in Oregon, from wholesale lumber pro-

ducers, transporting it to Idaho in his own vehicles, and "selling" it to retail lumber dealers.

Appellant does not maintain a retail or wholesale lumber yard or storage facility of any nature or an inventory or stockpile of lumber of any kind or at any place. (Tr. 5, 472). His basic and principal investment is in his truck equipment and his only payroll is his truck drivers. (Tr. 19, 45). Appellant's only income is derived from and through the operation of his trucks.

Substantially all lumber is sold, to two Idaho dealers, in truckload lots, but not one stick of lumber is purchased by appellant until and unless he receives an order from a dealer. (Tr. 20, 51). Each individual purchase of lumber is made to fill a specific order. There is a tacit understanding between the appellant and the dealer-purchaser that appellant is to perform the transportation and make delivery by use of his own trucks direct from the mill to the dealer. (Tr. 20, 49, 50).

Appellant quotes a selling price upon receiving an order. He is free to buy the lumber from any mill he chooses. Selling price is based upon cost, plus a calculated profit. No part of the difference between cost price and sale price is identified as transportation charges but, purportedly, some part of this figure is based upon cost of operation. (Tr. 20). In 1950 appellant made 90 "purchases" and 90 correspond-

ing "sales" resulting in a net gross profit of $27,653.00. (Tr. 21).

The representative shipments listed on plaintiff's Exhibit I, (Appendix II) for the convenience of this court, have been rearranged on a progressive mileage (distance) basis. The miles shown were taken from data shown on Defendant's Exhibit I, (app. Br., Appendix B). Appellee's exhibit (Appendix II) shows two things: (1) a comparison between published common carrier rates and appellant's net revenue translated in terms of rates (Tr. 35), and (2) the progressive increase of appellant's "profit" (in terms of rates) in direct relationship to distance traveled.

Appellant does not hold any authority, certificate or permit, from the Interstate Commerce Commission authorizing operations, of any kind, in interstate commerce.

V

QUESTION PRESENTED

Is the defendant engaged in the business of transporting lumber in interstate commerce for compensation as a common or contract carrier and subject to the regulatory provisions of Part II of the Interstate Commerce Act, or are the operations of the defendant in transporting lumber in interstate commerce those of a private carrier and as such not subject to said provisions of the Act?

VI

SUMMARY OF ARGUMENT

A. The conclusions of Law by the District Court are correct and are supported by prevailing authority.

1. The Interstate Commerce Act is a remedial statute and should be liberally construed to effect its evident purpose.

2. The Interstate Commerce Commission has determined that the primary business of the transporter is the controlling test in similar cases.

3. The courts have followed and applied the "primary business" test in the determination of the issue.

B. The application of the "primary business" doctrine is a factual process and must be predicated upon a consideration of every related factor involved. No single test factor is exclusive or determinative.

1. The compensation factor as argued in appellant's assignments of Error I, II, and III is not based upon reliable evidence nor is it controlling.

C. The cases relied upon by appellant in argument in support of assignments of Error IV and V are distinguishable from the case at bar and they aptly re-define the issue here involved.

VII

AUTHORITIES AND ARGUMENT

A. The conclusions of Law by the District Court are proper and supported by prevailing authority.

1. The legislation before the court (Part II, Interstate Commerce Act) is remedial and should be liberally construed to effect its evident purpose.

The determination of whether certain forms of transportation are for-hire carriage as a common or contract carrier or private carriage, has been a matter presented before both the Interstate Commerce Commission and the courts in numerous instances since the adoption of Part II of the Interstate Commerce Act.

In making a determination of the full nature of the transportation here considered, the purpose of the law as defined by the Transportation Act, 1940, is herewith restated:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services with-

> out unjust discriminations, undue preference or advantages or unfair or destructive competitive prices; * * * to the end of developing, coordinating and preserving a national transportation system, * * * adequate to meet the needs of the commerce of the United States * * * and of the national defense."

In this respect, in *Interstate Commerce Commission* v. *A. W. Stickle & Co.,* 41 F. Supp. 268, Aff. 128 F. (2d) 155, with reference to the national transportation policy as above set forth, the court stated:

> "In addition the court should have in mind the fact that this legislation is remedial and should be liberally interpreted to effect its evident purpose and that exception from the operation of the Act should be limited to effect the remedy intended * * *. Use may also be made of the decisions of the Interstate Commerce Commission as applied to analagous factual situations. The decisions, while not binding on the court, in the absence of decisions by the court, are persuasive and entitled to great weight."

and further the court said:

> "It must be assumed the Congress in defining a private carrier did not attempt thereby to afford a means or device whereby one might evade the provisions applicable to common or contract carriers."

And, further, in *Interstate Commerce Commission* v. *Pickard et al.,* 42 F. Supp. 351 (1941), the court having before it the question of private carriage, said:

"The methods herein employed could result in unjust discriminations, undue profits or advantages as between the partnership and other carriers. Of course a private carrier can fix its own rates of transportation, but the effect of the acts should be considered in connection with the proofs going to show the commission of the Acts."

In *Georgia Truck System, Inc.,* v. *Interstate Commerce Commerce,* 123 F. (2nd) 210, 212, the court observed:

"It is sufficient for us to say the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who no matter what form they use, *are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire.*" (Underscoring supplied.)

2. The Interstate Commerce Commission has determined that the "primary business of the transporter" is the controlling test.

The issues of for hire versus private carriage is one which has been considered by the Commission numerous times in various cases. Among the earliest was *Carpenter Common Carrier Application,* 2 M.C.C. 85. Carpenter owned and operated one small truck. His regular occupation was the hauling of milk from farm to creamery. His only interstate operations consisted of the transportation of coal from two collieries in an adjacent state directly to consumers. Upon receipt of an order for coal, he would

proceed to the mine, purchase the coal with his own funds, transport it to destination, and deliver it to the customers for a fixed amount in excess of the cost at the mine. Not withstanding his ownership of the coal while in transit and the other facts suggesting private carriage, it was found that in such operation he was "engaged primarily in the transportation of property" for compensation, and, since his transportation services were available to any who sought them, he was found to be a common carrier by motor vehicle.

This decision has been followed by many others involving operations of this character, a few of which are as follows: *Corner's Service, Inc., Contract Carrier Application,* 23 M.C.C. 803; *Starr Freight Service, Inc., Contract Carrier Application,* 16 M.C.C. 209; *Forister Common Carrier Application,* 10 M.C.C. 461; *Schulz Common Carrier Application,* 10 M.C.C. 453; *Johnson Common Carrier Application,* 10 M.C.C. 4; and *Moeller Common Carrier Application,* 6 M.C.C. 719.

In 1942 the Commission, with a view of clarifying and further identifying the status of common carriers and contract carriers as distinguished from private carriers, reviewed its own past determinations and restated certain test factors. The restatement was made in *L. A. Woitisheck Common Carrier Application,* 42 M.C.C. 193 (1943). In this case the

Commission held the applicant to be a private carrier. However in its determination it stated:

> "Thus we have a line of cases wherein persons engaged primarily in the supplying of transportation for compensation and with a purpose to profit from the transportation would have been found to be a carrier for-hire, notwithstanding that each was the owner of the goods transported while in transit and was transporting them for the purpose of sale and perhaps also had some other of the characteristics of a merchandiser. On the other hand, we have a line of cases in which persons who are primarily engaged in some manufacturing or merchandising undertaking have been found not to be carriers for-hire, though an incident to their primary business and without a purpose to profit therefrom, they perform certain transportation for which they receive compensation which is identifiable as compensation for transportation and in some instances included a profit. In other words, the finding for or against a carrier for-hire status in each such case has turned upon the sole question of fact as to the primary business of the transporter."

> "After careful study, it seems clear to us that the transportation 'for compensation' contemplated by both the contract and common definitions, as distinguished from the transportation 'for the purpose of sale, lease, rent, bailment, or in furtherance of any commercial enterprise' contemplated by the private carrier definition, is transportation which is supplied with a purpose to profit from the effort as distinguished from a purpose merely to make good or recover the cost of transportation furnished in the furtherance of some other primary business or transaction."

The Commission itself has followed implicitly the criteria pronounced in the Woitisheck case in its later decisions. An analysis of two subsequent Commission cases is pertinent hereto. *Lenoir Chair Company Contract Carrier Application,* 48 M.C.C. 259, and *Schenley Distillers Corporation Contract Carrier Application,* 48 M.C.C. 403 (1948). These cases not only re-define the "primary business doctrine" and the related factor of "compensation" as laid down in the Woitisheck case, but they clarify the issue. The full Commission examined these applications jointly on rehearing, 51 M.C.C. 65 - 1949. Ultimately the Commission's determinations in these cases were upheld by the United States Supreme Court, which court decision will hereinafter be referred to.

Lenoir was and is a furniture manufacturer. Its total production approximates $3,000,000.00 per year. Between 15% and 20% of this output is transported to customers by its own trucks, the balance being transported by rail and motor common carriers. *All sales are made F.O.B. its factory.* When transportation was performed in its own vehicles, it added an identifiable transportation charge which was comparable to that established by for-hire carriers. The records showed, though, that Lenoir actually lost money on the operation of its own vehicles. The Commission held that Lenoir was primarily engaged in the manufacture of furniture, and hence held it to be a private

carrier, but in determining the issue, it stated:

"The foregoing facts clearly establish that applicant's primary business is that of the manufacture of furniture. Although it does charge an identifiable figure for the transportation service provided by it when deliveries are made in its own vehicles and although this amount is comparable to a common carrier rate for the same service, we do not believe that these facts standing alone warrant a conclusion that applicant thereby is established as a carrier for-hire. We think it evident that applicant is not engaged in transportation with a purpose of profiting therefrom in the same sense as is a carrier for-hire. In reaching this conclusion we are not particularly impressed by the fact that it has been shown that such operations during recent specified periods were conducted at a loss. Applicant uses its own vehicles for the transportation of only 15 to 20 percent of its entire production. It has charged a rate comparable to that of common carriers not specifically because such a rate allows a for-hire carrier a measure of profit, but for the reason that such a procedure provides the same delivery price to its customers in all instances regardless of what carrier performs the transportation, and, perhaps, also because such a rate is readily obtainable from the tariffs of common carriers."

"* * * We conclude that applicant is primarily engaged in the manufacture of furniture, that its motor carrier operations are a bona fide incident to and in furtherance of its primary business, and that the transportation performed by it is not performed with a purpose to profit from the transportation as such."

Schenley is engaged in the production and distribution of alcoholic liquors and the manufacture of accessories used in such enterprise. The record discloses that only approximately 0.05% of all shipments are transported on Schenley's own motor vehicles. The balance moves by rail and motor common carriers. *The selling price of liquor is F.O.B. point of origin.* When transportation was performed by its own vehicles, a sum roughly equivalent to the rail rate was added to the selling price. The Commission held that Schenley was primarily engaged in a non-carrier business enterprise and hence held it to be a private carrier, and in its determination stated:

> "The primary business of the transporter is the basic test, not the fact that some compensation identifiable as such or hidden is collected. Compensation for transportation may be collected by a private carrier as such or indirectly and it may even include an incidental element of profit provided the transportation is not 'for compensation' in the sense that it is performed with a purpose or aim to profit as a carrier. To be a common or contract carrier by motor vehicle, there must be transportation 'for compensation' by one so engaged as a business and with an 'intent' or 'purpose' to profit from the compensation."

> "Clearly, applicant's primary business is the sale and distribution of alcoholic liquors. The out-bound transportation of packaged liquors, of which applicant is at the time the owner, is for the purpose of sale and in furtherance of its primary business. True, the delivered price of packaged liquors transported by appli-

cant to its customers is the selling price at point of origin plus a sum comparable to the rail rate therefrom to destination. However, this is to provide the same delivered price to its customers regardless of the method of transportation utilized and not with any purpose or aim to profit from the transportation as such."

3. The courts have accepted the "primary business" doctrine as a proper test in the determination of the issue.

The Commission decisions in the Lenoir and Schenley cases became subject to judicial review in *Brooks Transportation Company, et al.,* v. *United States, et al.,* 93 F. Supp. 517, affirmed 340 U.S. 925. The complainants in this case were motor common carriers for-hire. They took exception to the Commission's holding with respect to the compensation factor, contending objectively that the "rates" as collected by Schenley and Lenoir, beging comparable to established common carrier rates, necessarily provided an element of profit and hence the transportation activities of these business concerns were repugnant and contrary to private carriage and fell within the definition of common or contract carriage "for compensation". The court in upholding the Commission's views said:

"The Commission, in deciding that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as the *primary business test.* In other words, if it is es-

tablished that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item. The Commission has so held consistently in its interpretation of the statutory provisions regulating the various categories of motor carriers. See *Congoleum-Nairn, Inc., Common Carrier Application,* 2 M.C.C. 237; *D. L. Wartena, Inc., Common Carrier Application,* 4 M.C.C. 619; *Swanson Contract Carrier Application,* 12 M.C.C. 416; *Murphy Common Carrier Application,* 21 M.C.C. 54; *Dull Contract Carrier Application,* 32 M.C.C. 158; and *Woitisheck Common Carrier Application,* 42 M.C.C. 193.

And it said further;

"We deem it not inappropriate to consider what might be called the economic approach to the problem before us in the light of what might be called the felt needs and the best interests of the interstate carriers of goods by motor vehicle. In our considered judgment such an approach strongly favors the primary business test as against the compensation test. And the problem before us is primarily one that should be solved not by theoretical abstracts or by excursions into juristic semantics but rather by practical common sense. Just what type of measure of compensation was intended by Congress to bring the carriage within Section 203(a)(14) or (15) is best ascertained by the primary busi-

ness test. And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements."

The first and leading court decision involving this issue was *Interstate Commerce Commission* v. *A. W. Stickle.* In this case the facts are practically similar to the case now before the court. Briefly, the facts in the Stickle case were:

A. W. Stickle & Co. was the lessee of certain lumber storage facilities and ostensibly engaged as a dealer in lumber but carried very little stock. Stickle did maintain some semblence of a lumber stockpile. Less than 5% of its sales were filled from stored stock, and not infrequently its storage facilities were not used for two weeks or more. Generally, *upon receipt of an order,* it arranged to purchase the lumber required from certain mills to fill that order. There was no contact between the customer (buyer) and the lumber mill (seller). The lumber was hauled on Stickle's own trucks, which substantially was its only investment, and its drivers were its only payroll. The amount Stickle received for the lumber was in excess of what he paid for it. The difference consisted of (1) a transportation charge which was materially less than the transportation charges of duly authorized carriers, and (2) a commission. However, the net revenue (selling price over cost) approximated the published rates of regulated carriers. Approx-

imately 95% of Stickle's income was derived from this source of revenue.

In its findings the court said:

> "The trial court found in substance that Stickle & Co. is primarily engaged in the transportation of lumber for compensation under individual contracts with its customers, that the amount which Stickle & Co. receives from the customer for the lumber and the transportation thereof, in excess of the amount Stickle & Co. pays the mill for the lumber, approximates the amount a carrier who has complied with Part II (of the Interstate Commerce Act), and has a certificate of convenience and necessity would charge for transporting the same lumber; that the transportation by Stickle & Co. is not an incident to a commercial enterprise; and that, on the contrary the buying and selling of lumber is a means and device employed by Stickle & Co. to enable it to engage in the transportation of lumber as a contract carrier without complying with the provisions of Part II (supra) respecting common carriers and contract carriers."

> "We think it unimportant that the technical title to the lumber remains in Stickle & Co. until the transportation is completed and the lumber delivered to the customer. Prior to the transportation of the lumber and normally before the lumber has been purchased by Stickle & Co., it has entered into a contract to sell the lumber to a customer and to transport it to his yard * * * The transportation is not merely incidental to the business of selling lumber. It is a major enterprise in and of itself. * * * A carrier may not avoid the requirements of Part II (supra) by subterfuge or device, or by posing

> as a private carrier when, in substance and reality he has engaged under individual contracts in transportation by motor vehicle of property in interstate commerce for compensation. Ownership of the commodity transported is not the sole test. The primary test * * * is transportation for compensation."

B. The application of the primary business doctrine is a factual process and must be predicated upon the consideration of every related factor. No single test factor is exclusive or determinative.

1. The compensation factor as argued in Appellant's Assignment of Error I, II, and III is not based upon reliable evidence nor is it controlling.

The appellant assigns as error the District Court's Finding IV with reference to the comparison between the net sum accruing to appellant on lumber sales as compared with transportation charges of authorized carriers. Appellant states that the court erred "by making use of the artificial devise of averaging a group of disparate figures which still results in a substantial difference" (App. Br. 11). In order to empasize "disparate figures" appellant has resorted to a percentage computation based upon figures contained on Defendant's Exhibit 1 (Appendix B). It is to be noted that the percentage is based upon figures in a "Profit and Loss" column described as "Difference between net cost plus Mtr. Carrier Frt. Charges and selling price" as compared with figures in a "Profit and Loss" column

described as "Difference between net cost plus 23c per traveled mile and selling price." The percentages based upon this comparison are valueless. The record shows a total failure of evidence to support appellant's contention that his transportation costs amounted to 23c per traveled mile. (Tr. 52, 53, 54, 55). On the other the record discloses a cost factor based upon comparable transportation services far in excess of a 23c figure. (Tr. 37, 38, 39). If any "artificial devise" has been employed in this case certainly it cannot be charged to the District Court in view of its statement (Tr. 56) "I am not impressed with the 23c per mile statement. Go to something else."

In the Pre-Trial Order (para. VII) (Tr. 10) appellee contended that the sum of the difference between cost price and selling price of lumber "compares favorably" with transportation charges of duly authorized carriers. At no time has appellee contended that said sum "closely approximates" or bears a "fixed relationship" to common carrier charges. And most certainly the appellee has never contended that this factor is the "rationale" of its whole case.

Appellee admits and the District Court recognized a variance of revenue with respect to individual shipments. The fluctuation in the net return on the transportation of various shipments by appellant is no different than that generally experienced by common carriers subject to the

Interstate Commerce Act. No carrier will earn the same return on a series of identical shipments over a given period even though the rate is the same on all of them. The net profit on each individual shipment in a series of identical shipments will vary considerably caused by a variety of factors, such as performance by different employees, weather conditions, shippers facilities for loading, consignees facilities for unloading and other similar details. One of the benefits which the regulation of rates extends to the shipping public is that the shipper can depend upon a stabilized transportation factor in merchandising his goods and the carrier must absorb or assume the fluctuations in costs between handling individual shipments—to take the bitter with the sweet.

The record adequately supports the Finding IV (L) of the District Court that "Taking all of the shipments as a whole, the net sum accruing to the defendant on lumber sales is an amount that *compares favorably* with transportation charges of duly authorized carriers for similar shipments * * *". Appellant's own analysis of Appendix II (Plaintiff's Exhibit I) discloses an over-all variance of 6.7%. The evidence of record discloses (Tr. 59):

> Q. (by the court) and usually you are pretty safe when you are quoting a price, you can quote it at a price you think you can make a profit on, isn't that right?

A. (by appellant) That is right. Sometimes, however, I haven't been too safe.

Appellant attempts to distinguish the Stickle case (supra) from the case at bar. Suffice it to say, that court did not base its decision upon the compensation factor solely. It observed the whole factual situation. Those who operate in evasion of regulation adopt methods designed to accomplish the end. Some learn by the experience of others. It is admitted that appellant's "profit" is not identified as a transportation charge. We fail to find legal significance in the difference of meaning between "approximate" and "compares favorably" with respect to the compensation factor. Nor are we alarmed because the District Court did not find that a "design" resided in appellant's mind when he took title to lumber under the circumstances here considered.

C. The cases relied upon by appellant are distinguishable from the case at bar and they aptly re-define the issue involved here.

In *Interstate Commerce Commission v. Pickard et al.*, 42 F. Supp. 351, it is admitted that the issue there involved a separate and dissimilar state of facts. Appellee cited the case (supra) only as authority for the proposition that the intendments of the Interstate Commerce Act can be circumvented by subterfuge and it requires vigilant inquiry

under such circumstances to effectuate the purposes of the Act.

In *Interstate Commerce Commission* v. *Jamestown Sterling Corporation,* 64 F. Supp. 121, the court in upholding a Commission determination, recognized a duality of functions. This case holds that a furniture manufacturer in the transportation of its own merchandise can function as a common carrier as to those shipments where an identifiable and measurable transportation charge is assessed and collected which bears no relation to the out of pocket costs of transportation.

Appellant further states that there are three cases in the Federal courts, one of which was affirmed by the Supreme Court of the United States, wherein the defendants have prevailed in similar situations. These three cases were cited as follows: *Interstate Commerce Commission* v. *Tank Car Oil Company,* 151 Fed. 2d 834, affirming 60 Fed. Supp. 133; *Interstate Commerce Commission* v. *Clayton,* 127 Fed. 2d 969; *Brooks Transportation Co.* v. *United States,* 93 Fed. Supp. 517, affirmed by Supreme Court February 26, 1951, 71 Sup. Ct. 501. An analysis of the facts in these three cases will indicate to the court here either that the decisions were based upon a dis-similarity of facts or that the issue involved was not of the same character.

In the Tank Car Oil Company case the dis-similarity with the instant case is immediately discernible in the first

few lines of the statement of facts as found by the court, viz:

> "It (defendant) owns and operates 12 filling stations for the retail sale of gasoline, oil, and kerosene; it has furnished all pumps, tanks and other equipment in 4 additional filling stations under contracts which require the operators to purchase gasoline only from the appellee (defendant)."

The issue in the Tank Car case was predicated upon the fact that defendant took orders for and supplied gasoline to other filling stations at wholesale prices and transported the gasoline to the purchasers in its own vehicles in like manner as it transported its own gasoline. The court held the defendant to be engaged in the primary business of distribution of petroleum products and that sales to others was an integrated part of its primary undertaking. The plaintiff has no quarrel with the decision in this case. We feel that it represents a situation which is completely contrary to the facts in the instant case and represents clearly the contention of the plaintiff, that is the application of the "primary business test" as applied to cases of this kind.

The *Clayton case* is obviously distinguishable from the case at bar. In holding that Clayton was performing a private carrier service, the court found the following facts: Clayton maintained a coal yard at his home in Ucon, Idaho, and sold coal therefrom to the public generally in Ucon

and nearby neighboring towns. He never purchased coal to fill any specific or particular prior orders. There was no difference in the selling price delivered at Ucon or at the nearby towns, although delivery to the other towns entailed a longer haul. He did not haul coal for compensation under any individual contract or arrangement.

Again the Clayton case represents clearly the position of the appellee that the size of the business is immaterial, but in the determination of the question an identifiable primary business must be established and then if transportation is performed in furtherance of that commercial enterprise, a private carrier status recognition is justifiable.

The facts in the instant case are obviously contrary to the facts in the Clayton case. Succinctly stated, the appellant in this case "engaged in the lumber business" only after he had entered into an individual contract to transport a specific order of lumber—a contract which he would not have entered into unless he himself could perform the transportation. It is believed that the apparent dis-similarity requires no further exposition.

The appellee has cited the *Brooks Transportation* case (supra) for the sole purpose of demonstrating to this court the extent to which the courts have followed the "primary business" doctrine as established by the Interstate Commerce Commission. We fail to see how the Brooks case can lend any support to the appellant. Supposedly it was

cited by the appellant in order to incorporate a statement made by the late Commissioner Joseph B. Eastman in connection with testimony taken at legislative hearings when the Transportation Act was being promulgated.

Specifically, appellant quoted the late Commissioner Eastman as follows (App. Br. 19):

> "Well, I was going to say that in instances where the trucker actually buys the product which he transports, that is a bonafide transaction and not merely a devise to evade regulation, he would be a private carrier."

The quotation as reported, 93 F. Supp. 517, p. 524, is entirely different in text and meaning, viz:

> "Well, I was going to say that in instances where the trucker actually buys the products which he transports, *if* that is a bonafide transaction and not merely a devise to evade regulation, he would be a private carrier". (Underscoring supplied.)

Further not only did appellant mis-quote the statement, but Mr. Eastman's quotation was in a sense abortive and apparently the defendant purposely avoided citing the complete import of the proceeding referred to. The trial court, in arriving at its decision in the Brooks case considered matters of legislative history on the subject of private carriage. Considerable of the testimony adduced before the Interstate Commerce Commission was cited by the court

and a full disclosure of that testimony shows that the committee aptly recognized the point involved when its members made consistent reference to private carriage and connected it with "a private concern" or "department stores", which statements naturally referred to an underlying primary business enterprise.

VIII

CONCLUSION

The antecedent history of conditions existing in the area of total transportation illuminates the necessary for regulation. The prevalence of practices thought to be inimical alike to public safety and economy was brought to the attention of Congress and the Motor Carrier Act of 1935 (now Part II, Interstate Commerce Act) resulted. The Act was designed to regulate motor carrier transportation, in the same manner as railroads have been regulated since 1887, with the view not only to promote a sound transportation system but to protect the public generally from "unsound economical conditions, unjust discriminations and undue preferences or advantages".

From the authorities it is gleaned that each case must be individually and subjectively considered. The tests to be applied are functional. Appellee submits that the facts in this case show that appellant is engaged in the primary business of transportation, that he "buys" and "sells" lum-

ber in order to transport it and in furtherance of his primary undertaking, that the revenue received is in fact compensation for compensation as such; and therefore that appellant is a carrier within purview of the Interstate Commerce Act.

It is respectfully urged that the Judgment and Order of the District Court be sustained and the appeal herein be dismissed.

Respectfully submitted,

HENRY L. HESS,
United States Attorney.
DONALD W. McEWEN,
Assistant United States Attorney.
WILLIAM L. HARRISON,
Attorney for the Interstate
Commerce Commission,
United States Courthouse,
Portland, Oregon,
Attorneys for the Appellee.

APPENDIX I

ITEM 1

Section 203 (a) of the Interstate Commerce Act (49 U.S.C. 303 (a)) defines the terms "common carrier by motor vehicle", "contract carrier by motor vehicle", "motor carrier", and "private carrier of property by motor vehicle" as follows:

> (14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation, shall continue to be considered to be and shall be regulated as transportation subject to Part I.
>
> (15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commence for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commence by motor vehicle, property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

ITEM 2

Section 206 (a) * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation; * * * (49 U.S.C. 306 (a)).

ITEM 3

Section 209 (a) * * * no person shall engage in the business of a contract carrier by motor vehicle in

interstate or foreign commerce on any public highway, * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business; * * * (49 U.S.C. 309 (a)).

APPENDIX II

ITEM 4

ROUND TRIP MILES	IDAHO DESTINATION	BOARD FOOTAGE	NET REVENUE	PUBLISHED RATE	DEFENDENT'S REVENUE TRANSLATED IN TERMS OF RATES
734	Caldwell	16913	334.76	19.03	19.79
796	Weiser	18000	441.00	21.79	22.05
818	Nampa	16267	352.36	20.87	21.60
820	Homdale	15682	419.09	20.87	26.72
852	Caldwell	20231	446.09	21.79	22.05
910	Boise	13440	201.94	25.87	15.10
938	Boise	17382	442.88	23.63	25.48
936	Boise	12177	320.62	26.30	26.33
984	Mt. Home	20025	450.61	25.01	27.55
1028	Mt. Home	16000	590.60	25.92	36.91
1062	Mt. Home	18902	406.83	26.82	21.52
1106	Gooding	15793	386.93	27.77	24.50
1172	Buhl	17517	446.33	29.15	25.48
1172	Twin Falls	16112	420.52	29.15	26.10
1242	Arco	17903	452.93	30.99	25.30
1424	Blackfoot	18301	561.82	35.13	25.23
1424	Blackfoot	17722	421.26	35.13	23.78
1514	Blackfoot	12000	452.16	39.67	40.18

No. 13512

United States
COURT OF APPEALS
for the Ninth Circuit

CLAUDE A. TAYLOR,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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SEYMOUR L. COBLENS,
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WILLIAM L. HARRISON,
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-52

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TABLE OF CASES

No. 13512

United States
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INTERSTATE COMMERCE COMMISSION,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

PRELIMINARY STATEMENT

This is a Reply Brief in reply to appellee's brief and is submitted for the purpose of refuting certain statements made by appellee in its brief and for the purpose of explaining certain statements made in appellant's brief to which appellee has taken exception.

Point I

Appellee's statement that "Appellant's only income is derived from and through operation of his trucks" is not supported by any evidence or finding.

ing is contained in paragraph IV-E of the Findings of Fact (Tr. p. 20) and the Court states, referring to the appellant, "He solicits orders for lumber with an express or implied understanding with the customer that he is to arrange for transportation, which defendant performs in his own vehicles." The Court, however, in Finding of Fact No. 1 (Tr. p. 18) has also found that the facts admitted in the Pre-Trial Order are true. Among the admitted facts (Tr. p. 6) is the following: "The defendant is free to use any type of transportation he chooses, either rail, motor carrier or water, if available." Paragraph 12 of the admitted facts (Tr. p. 6) also states that "The delivered price to the purchaser of the lumber sold is established regardless of the method of transportation." Since there is no claim that appellant owns or controls any other means of transportation, it is difficult to see how there is any agreement, express or implied, that the lumber is to be transported in appellant's vehicles. There is no evidence in the testimony or in any of the admissions of the Pre-Trial Order which in any way sustains the implication contained in the above-quoted sentence of paragraph IV-E of the Findings of Fact. It thus appears that, at the very least, the Court's Finding in paragraph IV-E contradicts the Admissions of Fact contained in the Pre-Trial Order and is certainly not sustained by any of the evidence in the record.

Point III

The typographical error contained in appellant's brief referred to in page 26 of appellee's brief does not materially affect the authority of the quotation cited.

Counsel for the appellant sincerely regrets the typographical error which resulted in the omission of the word "if" in the quotation contained in page 19 of appellant's brief. However, the correction does not in any way weaken its authority for the proposition advanced by appellant. It is quite apparent that Commissioner Eastman was being cautious and was trying to distinguish between a bona fide sale and a purported or sham sale wherein none of the elements of a change of title are present. The transaction referred to by the Commissioner in his statement ". . . if that is a bona fide transaction" obviously refers to the transaction of purchase and sale, and even with the word "if" inserted where it should be, it is quite apparent that it was the Commissioner's opinion that if there was a bona fide purchase and sale, the person doing the transporting would be a private carrier. In the case at bar, it is admitted in the words of the Pre-Trial Order, as follows (Tr. pp. 7 and 8, paragraph XIV, Pre-Trial Order):

> "The absolute and bona fide title to the lumber purchased by the defendant passes to the defendant as soon as he takes delivery at the origin mill site and he assumes the responsibility for any damage or loss to the same thereafter until delivery free to sell to others."

Paragraph XII of the Admissions of Fact in the Pre-Trial Order (Tr. p. 8), reads as follows:

> "The defendant assumes all the risks incident to transportation, including acts of God and public enemy."

Paragraph VIII of the Pre-Trial Order (Tr. p. 7), reads as follows:

> "The defendant is free to buy the lumber for which he has an order anywhere he chooses, and may sell the same to other consumers even after the same is purchased by him to fill a specific order."

It is thus apparent that the transaction wherein the appellant purchases the lumber was substantial and real and carried with it all of the elements of change of title, including absolute liability for the price to the supplier whether or not appellant was paid for the lumber by his customer and absolute liability for loss or damage en route. The transaction was thus real and substantial and was the type of transaction the Commissioner had in mind while he was testifying before the Senate Interstate Commerce Committee.

Point IV

The case of Georgia Truck System vs. Interstate Commerce Commission, 123 Fed. (2d) 210, is authority for the position taken by the appellant.

Appellee cites *Georgia Truck System vs. Interstate Commerce Commission,* 123 Fed. (2d) 210, as authority for its position. The appellant has no quarrel with that

case and is heartily in accord with its rationale. The Court in that case found that the transaction of lease was a sham, and in the words of the vernacular, a "phoney". Note 3, at 123 Fed. (2d) 212, indicates quite clearly that the lease transaction referred to in that case was merely a "paper one" and that the actions of the parties belied their words. In the case at bar, there is no such evidence. The appellant took absolute and bona fide title to the lumber from his source of supply, became liable for the price thereof, bore the risk of loss thereof as owner while in the course of transportation, and took the credit risk as seller upon delivery to his customer. No element of sham or evasion was present in any part of the transaction, nor does the appellee claim any. None of the factors present in the *Georgia Trucking* case are present in this case at bar, except the fact that they both relate to motor vehicles.

Point V

For the reasons stated herein and in appellant's main brief the judgment of the District Court should be reversed and the complaint dismissed.

Respectfully submitted,

HICKSON & DENT,
SEYMOUR L. COBLENS,
Attorneys for Appellant.

No. 13523

United States Court of Appeals

for the Ninth Circuit.

ESTATE OF WALLACE CASWELL, Deceased; JENNIE J. CASWELL, Administratrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

ESTATE OF CHARLES HENRY CASWELL, Deceased; EARL W. CASWELL, Administrator,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-9-53

No. 13523

United States Court of Appeals

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ESTATE OF WALLACE CASWELL, Deceased; JENNIE J. CASWELL, Administratrix,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

WAREHAM SEAMAN, ESQ.

For Respondent.

CHARLES W. NYQUIST, ESQ.

The Tax Court of the United States

Docket No. 27017

ESTATE OF WALLACE CASWELL, Deceased, JENNIE J. CASWELL, Administratrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1950

Feb. 27—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 27—Request for Circuit hearing in San Francisco, Calif. filed by taxpayer. 3/15/50 Granted.

Feb. 28—Copy of petition served on General Counsel.

Mar. 28—Answer filed by General Counsel.

Mar. 28—Request for hearing in San Francisco, Calif. filed by General Counsel.

Apr. 4—Copy of answer and request served on taxpayer. San Francisco, California.

Aug. 31—Hearing set, November 1, 1950, San Francisco, California.

Nov. 13—Hearing had before Judge Turner on merits, counsel's motion to consolidate with docket 27018 granted. Stipulation of facts filed. Petitioner's brief December 28,

1950

1950, Respondent's brief February 28, 1951, Petitioner's reply March 30, 1951.

Dec. 5—Transcript of hearing November 13, 1950, filed.

Dec. 26—Brief filed by taxpayer.

1951

Feb. 20—Reply brief filed by General Counsel.

Mar. 30—Reply brief filed by taxpayer. Copy served.

1952

Jan. 18—Opinion rendered, Turner, Judge. Decision will be entered under Rule 50. Copy served.

Feb. 12—Motion for entry of decision for respondent filed by respondent. 2/13/52 Denied.

Mar. 11—Respondent's computation filed.

Mar. 13—Hearing set April 9, 1952 on respondent's computation.

Apr. 4—Consent to respondent's computation for entry of decision filed.

May 5—Decision entered. Judge Turner, Division 8.

May 8—Order amending caption of the Opinion promulgated January 18, 1952 entered.

Aug. 4—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Aug. 4—Praecipe for record filed by taxpayer.

Aug. 5—Proof of service of notice of filing petition for review filed.

Aug. 5—Proof of service of notice of filing praecipe for record filed.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (San Francisco Division: IRA:90-D: DRU) dated December 5, 1949, and as a basis of his proceeding alleges as follows:

1. The petitioner is a fiduciary, with residence at Ceres, California. As executrix of the Estate of Wallace Caswell, deceased, successor to Wallace Caswell to whom the notice of deficiency is addressed, the fiduciary has authority to execute this petition. The return for the period here involved was filed with the collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on December 5, 1949.

3. The tax controversy is income tax for the calendar year 1945 and in the amount of $7,828.97.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in increasing the income from farming in the amount of $1,070.45 in this amount of depreciation.

(b) Respondent erred in adding to the income of petitioner the amount of $2,348.92 as the face value of Turlock Co-operative Growers Association Certificates issued to the petitioner in 1945.

(c) Respondent erred in adding to the income of Caswell Brothers, Ceres, California, a partnership in which petitioner has a one-half interest, the amount of $7,121.78 as the face value of Turlock Co-operative Growers Association Certificates issued to the partnership in 1945.

(d) Respondent erred in disallowing depreciation in the amount of $2,777.21 in arriving at the ordinary net income of Caswell Brothers, Ceres, California, a partnership in which petitioner has a one-half interest.

(e) Respondent erred in allowing only the sum of $815.02 as actual deductions in lieu of standard deduction.

(f) Respondent erred in his allocation of income between separate property and community property for the year 1945.

5. The facts upon which petitioner relies are as follows:

(a) With reference to the error alleged in paragraph 4(a) above:

(1) Among the assets of the petitioner were farm buildings, grapes, auto, ladders and other equipment and pipeline.

(2) The details of fact supporting this assignment of error is too extensive to set forth herein with particularity, since the basis for this adjustment is not set forth in the notice of deficiency.

(b) With reference to the error alleged in paragraph 4(b):

(1) Petitioner was a member of the Turlock Co-operative Growers Association in Turlock, California.

(2) During 1945 petitioner received from said co-operative pursuant to its bylaws, certificates in the face amount of $2,348.92.

(3) The Co-operative neither on the face of the certificates nor in its bylaws provides for a fixed maturity date of these certificates.

(c) With reference to the error alleged in paragraph 4(c):

(1) Petitioner had a one-half interest in the partnership of Caswell Brothers, Ceres, California, the other one-half being in the name of his brother, Charles Henry Caswell.

(2) This partnership was a member of the Turlock Co-operative Growers Association, Turlock, California.

(3) During 1945 said partnership received from said co-operative pursuant to its bylaws certificates in the face amount of $7,121.78.

(4) The Co-operative neither on the face of the certificate nor in its bylaws provides for a fixed maturity date of these certificates.

(d) With reference to the error alleged in paragraph 4(d):

(1) Among the assets of the partnership identified in 5(c); immediately preceding, were building, machines, fences, pipeline and pump.

(2) The detail of facts supporting this assignment of errors is too extensive to set forth

herein with particularity, since the basis for this adjustment is not set forth in the notice of deficiency.

(e) With reference to the error set forth in paragraph 4(e):

(1) During 1945 petitioner had other allowable actual deductions, such as contributions, for income tax purposes.

(f) With reference to the error alleged in paragraph 4(f):

(1) Throughout the year 1945 petitioner was married to Jennie Caswell and they lived and worked together as husband and wife.

(2) It was the intention of petitioner and his wife that all income to such status be deemed community income.

Wherefore petitioner prays that The Tax Court of the United States shall hear this proceeding and determine:

1. That there is no deficiency in income tax due from the petitioner for the calendar year of 1945.

2. That the petitioner have such relief as is meet and just in the premises.

/s/ WAREHAM SEAMAN,
Attorney.

EXHIBIT A

Treasury Department
Internal Revenue Service

74 New Montgomery Street
San Francisco 5, California

December 5, 1949.

San Francisco
IRA:90-D:DRU

Mr. Wallace Caswell,
Post Office Box 7,
Ceres, California.

Dear Mr. Caswell:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1945, discloses a deficiency of $1,828.97 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday and Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Confer-

ence Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By F. M. HARLESS,
Internal Revenue Agent in
Charge.

Enclosures:

Statement
Form 1276
Form 870
Exhibits A, B and C.

SAN FRANCISCO
IRA:90-D:DRU

STATEMENT

Mr. Wallace Caswell
Post Office Box 7
Ceres, California

Tax Liability for the Taxable Year Ended December 31, 1945

	Deficiency
Income Tax	$7,828.97

In making this determination of your income tax liability, careful consideration has been given to your protests dated January 20, 1949, and February 17, 1949.

Adjustments to Net Income

Net income as disclosed by return		$13,932.69
Unallowable deductions and additional income:		
(a) Farm income	$ 58.50	
(b) Partnership income	12,331.43	
(c) Dividends	1,069.74	
(d) Rents	471.00	
(e) Oil lease	71.67	
(f) Standard deduction	500.00	14,502.34
Total		$28,435.03
Nontaxable income and additional deductions:		
(g) Taxes	$ 660.77	
(h) Net capital loss	154.25	815.02
Net income as adjusted		$27,620.01

Explanation of Adjustments

(a) Income from farming is increased by $58.50 as follows:

Total farm income reported		$2,922.26
Additions to income:		
(1) Depreciation	$1,070.45	
(2) Turlock Co-operative Growers' Association Certificates	2,348.92	
(3) Taxes	1,256.54	4,675.91
Total farm income as corrected		$7,598.17
Your community share as computed in Exhibit B, attached		1,519.63
Amount reported on your return (½ of $2,922.26)		1,461.13
Adjustment—increase in income		$ 58.50

(1) Deduction for depreciation is reduced by $1,070.45 as shown in Exhibit A, attached.

(2) It is disclosed that you and your wife, Mrs. Jennie J. Caswell, received certificates from the Turlock Co-operative Growers' Association during the taxable year as follows:

Number of Certificate	Date Issued	Face Value
1111	2-1-1945	$ 140.38
1112	2-1-1945	789.72
1230	11-1-1945	1,418.82
Total		$2,348.92

On the basis of available information, it is held that the fair market value of the certificates is the face value in the sum of $2,348.92. Inasmuch as your books and records are maintained on the cash basis, the fair market value of the certificates, or $2,348.92, is included in taxable income.

(3) Deduction of $1,256.54 for state income taxes of $1,296.54 and sales taxes of $50.00 is disallowed as not representing an allowable farm expense but such taxes are considered in item (g) below.

(b) Partnership income from Caswell Brothers, Ceres, California, is increased by $12,331.43 as shown below:

Ordinary net income reported on partnership return		$19,842.59
Additions to income:		
(1) Turlock Co-operative Growers' Association Certificates	$7,121.78	
(2) Depreciation	2,777.21	9,898.99
Ordinary net income of partnership as corrected		29,741.58
Your 50% distributive share		14,870.79
Add: Income from other partnerships		11,091.57
Partnership income as corrected		$25,962.36
Your separate and community share as computed in Exhibit B, attached		22,769.89
Amount reported on your return		10,438.46
Adjustment—increase in income		$12,331.43

(1) It is held that the fair market value of certificates received from the Turlock Co-operative Growers' Association during the taxable year is the face value of the certificates, or $7,121.78 as shown below:

Certificate No. 1110 issued 2-1-1945	$2,731.86
Certificate No. 1229 issued 11-1-1945	4,389.92
Total	$7,121.78

Inasmuch as the books and records of the partnership are maintained on the cash basis, the amount of $7,121.78 representing the fair market value of the above-mentioned certificates is included in taxable income.

(2) Excessive depreciation claimed in the amount of $2,777.21 is disallowed as shown in Exhibit C, attached.

(c), (d) and (3) Income from dividends, rents and oil lease is increased by the amounts of $1,069.74, $471.00 and $71.67, respectively, due to reallocation of separate and community income as shown in Exhibit B, attached.

(f) The standard deduction of $500.00 claimed on your return is disallowed and in lieu thereof there is allowed a deduction of $660.77 for taxes as shown in item (g) below.

(g) Deduction of $660.77 is allowed for taxes as follows:

	Total	Jennie J. Caswell	Wallace Caswell
California income tax	$1,141.54	$570.77	$570.77
Iowa income tax	65.00	0.00	65.00
California sales taxes	50.00	25.00	25.00
Totals	$1,256.54	$595.77	$660.77

(h) You allocated one-half of a net capital loss of $308.50, or $154.25, to your wife, Mrs. Jennie J. Caswell. Since it is disclosed that the assets sold were your separate property, the entire loss of $308.50 is allowed on your return resulting in a decrease in income of $154.25.

Computation of Tax

Net income	$27,620.01	
Less: Surtax exemption	500.00	
Surtax net income	$27,120.01	
Surtax on $27,120.01		$11,434.41
Net income	$27,620.01	
Less: Normal tax exemption	500.00	
Normal tax net income	$27,120.01	
Normal tax, 3% of $27,120.01		813.60
Correct income tax liability		$12,248.01
Income tax disclosed by return, page 1—line 6 Original, Account No. 3027571 First California District		4,419.04
Deficiency of income tax		$ 7,828.97

EXHIBIT "A"
Depreciation

Description	Acquired	Cost	Prior Depreciation	Remaining Cost From 1/1/1945	Remaining Life From 1/1/1945	Depreciation Allowable 1945
Farm Bldg.	1916	$5,785.00	$4,859.40	$ 925.60	5⅓ yrs.	$ 173.55
20 acres Tokay Grapes	1916	4,000.00	2,800.00	1,200.00	12 yrs.	100.00
Auto	6/30/41	1,100.00	770.00	330.00	1½ yrs.	220.00
Orchard ladders	6/30/41	320.00	112.00	208.00	6½ yrs.	32.00
Orchard props	6/30/41	800.00	280.00	520.00	6½ yrs.	80.00
Pipe line	1945	3,621.21	0.00	3,621.21	20 yrs.	181.06

Depreciation allowable	$ 786.61
Depreciation per return	1,857.06
Adjustment	$1,070.45

Depreciation claimed per return on assets which are not shown above have not been allowed as costs basis was unascertainable.

EXHIBIT "B"

Allocation of Separate and Community Income

	Total Income	Jennie J. Caswell	Wallace Caswell
Farm Income	$7,598.17		
Separate income—60% of $7,598.17		$4,558.90	
Community income—40% of $7,598.17		1,519.63	$ 1,519.63
Totals		6,078.53	1,519.63
Partnership Income	25,962.36		
Separate income $10,000.00 plus 60% of $15,962.36			19,577.42
Community income—40% of $15,962.36		3,192.47	3,192.47
Totals		3,192.47	22,769.89
Dividend Income	3,565.80		
Separate income—60% of $3,565.80			2,139.48
Community income—40% of $3,565.80		713.16	713.16
Totals		713.16	2,852.64
Amount reported on your return (½ of $3,565.80)			1,782.90
Adjustment—increase			1,069.74
Rental Income	1,570.00		
Separate income—60% of $1,570.00			942.00
Community income—40% of $1,570.00		314.00	314.00
Totals		314.00	1,256.00
Amount reported on your return (½ of $1,570.00)			785.00
Adjustment—increase			471.00
Oil Lease	238.90		
Separate income—60% of $238.90			143.34
Community income—40% of $238.90		47.78	47.78
Totals		47.78	191.12
Amount reported on your return			119.45
Adjustment—increase			$ 71.67

EXHIBIT "C"
Depreciation

Description	Acquired	Cost	Prior Depreciation	Remaining Cost 1/1/1945	Remaining Life From 1/1/1945	Depreciation Allowable 1945
Farm Bldg.	1929	$14,700.00	$ 7,071.06	$7,628.94	9 years	$ 847.66
Farm Machines	Various	20,941.00	15,700.03	5,240.97	9 years	582.33
Fences, pipe line	Various	3,209.50	1,969.50	1,240.00	16 years	77.50
Pipe line	1945	226.40	0.00	226.40	20 years	11.32
Irrigation pump	1945	2,000.00	0.00	2,000.00	10 years	200.00
Total depreciation allowable						$1,718.81
Depreciation claimed per return						4,496.02
Adjustment						$2,777.21

Duly verified.

Received and filed T.C.U.S., February 27, 1950.

Served February 28, 1950.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above petitioner, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1945; denies the remaining allegations contained in paragraph 3 of the petition.

4 (a) to (f), inclusive. Denies the allegations of error contained in paragraph 4 (a) to 4 (f), inclusive, of the petition.

5 (a) (1). Admits the allegations contained in paragraph 5 (a) (1) of the petition.

(2) Denies the allegations contained in paragraph 5 (a) (2) of the petition.

(b) (1). Admits the allegations contained in paragraph 5 (b) (1) of the petition.

(2). Admits that during 1945 petitioner received from said co-operative certificates in the face amount of $2,348.92; denies the remaining allegations contained in paragraph 5 (b) (2) of the petition.

(3). Denies for lack of information the allegations contained in paragraph 5 (b) (3) of the petition.

(c) (1). Admits that Wallace Caswell had a one-half interest in the partnership of Caswell Brothers, Ceres, California, the other one-half being in the name of his brother, Charles Henry Caswell.

(2). Admits the allegations contained in paragraph 5 (c) (2) of the petition.

(3). Admits that during 1945 said partnership received from said co-operative certificates in the face amount of $7,121.78; denies the remaining allegations contained in paragraph 5 (c) (3) of the petition.

(4). Denies for lack of information the allegations contained in paragraph 5 (c) (4) of the petition.

(d) (1). Admits the allegations contained in paragraph 5 (d) (1) of the petition.

(2). Denies the allegations contained in paragraph 5 (d) (2) of the petition.

(e) (1). Denies the allegations contained in paragraph 5 (e) (1) of the petition.

(f) (1). Admits the allegations contained in paragraph 5 (f) (1) of the petition.

(2). Denies the allegations contained in paragraph 5 (f) (2) of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,

T. M. MATHER,
CHARLES W. NYQUIST,
Special Attorneys, Bureau of Internal Revenue.

Received and Filed T.C.U.S. March 28, 1950.

The Tax Court of the United States

No. 27017

ESTATE OF WALLACE CASWELL, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 27018

ESTATE OF CHARLES HENRY CASWELL, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated January 18, 1952.

FINDINGS OF FACT AND OPINION

The petitioners were members of a co-operative growers association through which they marketed their peaches. Under the marketing plan, the peaches were placed in a pool with peaches of like kind, grade and classification produced by other members. When the peaches were sold and the pool was closed, the net proceeds, less an association charge, were distributed to the members on the basis of participation. The association charge, after payment of general organization and association

expenses, was carried into a capital reserve and, in addition to the cash distributed, the members also received on the basis of participation in the selling pool, interest-bearing certificates representing their interests, in the capital reserve, which certificates they were free to sell, exchange and assign. Held, that the petitioners, upon receipt of certificates, received and realized income to the extent of the fair market value of the certificates received. Held, further, that the fair market value of the certificates was equal to face.

WAREHAM C. SEAMAN, ESQ.,
For the Petitioners.

CHARLES W. NYQUIST, ESQ.,
For the Respondent.

OPINION

Turner, Judge:

The proceeding at Docket No. 27017, the Estate of Wallace Caswell, involves a deficiency in income tax for 1945 of $7,828.97, and that at Docket No. 27018, the Estate of Charles Henry Caswell, a deficiency for the same year, of $5,278.10.

The primary issue presented is whether income was realized by the taxpayers in 1945 upon the receipt of certificates issued by a co-operative association upon its commercial reserve fund and if income was so realized, the question arises as to the fair market value of the certificates at the time they were received by the Caswells. Other issues raised in the pleadings have been adjusted between the

parties and effect will be given to the adjustments made under Rule 50.

The facts have been stipulated and are found as stipulated.

Wallace Caswell, until his death on December 3, 1949, and for the years material hereto, was a resident of Ceres, California. He filed his income tax return for the taxable year 1945 with the collector of internal revenue for the first district of California. After his death, his wife, Jennie J. Caswell, was duly appointed and qualified as administratrix for her husband's estate. In the year 1945, Wallace Caswell filed his return on a cash receipts and disbursements basis and reported all income as the community income of himself and wife, with whom he was married at all times material hereto.

Charles Henry Caswell, until his death on June 26, 1949, and for the years material hereto, was a resident of Ceres, California. He filed his income tax return for the taxable year 1945 with the collector of internal revenue for the first district of California. After his death, Earl W. Caswell was duly appointed and qualified as administrator of the estate of Charles Henry Caswell, deceased. In the year 1945, Charles Henry Caswell filed his return on the cash receipts and disbursements basis and reported all income as community income of himself and wife, Helen C. Caswell, with whom he was married at all times material hereto.

Wallace and Charles Henry Caswell each had a one-half interest in the partnership, Caswell Brothers, of Ceres, California. This partnership was en-

gaged in growing peaches which it marketed through the Turlock Co-operative Growers Association of which it was a member.

The Turlock Co-operative Growers Association, sometimes referred to herein as The Co-op, or Turlock, is a California farmers' co-operative marketing association located at Modesto, California. During 1945, and so far as appears during all other years, Turlock was exempt from income tax under section 101 of the Internal Revenue Code.

The Co-op conducted business with its members pursuant to a crop contract. The contract in form was a contract of purchase. It covered all of the crop or crops to be produced for designated years on specified land. "Terms and Condition" 4, 5 and 6 were as follows:

> 4. The association shall pool the commodities of the Grower with commodities of like kind, grade and classification purchased by the Association under contracts similar to this, and the price to be paid to the Grower therefor shall be based on the average price per pound at which all commodities of like kind, grade and classification shall have been sold by the Association.
>
> 5. The Association, if market and financial conditions in its judgment justify, may make advances on account of payment on the commodities purchased by it hereunder, the amount of such advances being based on market and

financial conditions and the quality of the commodities.

6. The Association agrees to sell said commodities in bulk in its natural state as delivered, or at its option, to can, preserve, manufacture, process and pack said commodities, or to procure the same to be done, and thereafter sell the same as rapidly as possible and pay the proceeds over to the Grower, named in this and similar contracts, first deducting any advances made the Grower, and each Grower's pro rata share of the cost of receiving, handling, manufacturing, canning, storing, selling, advertising, and other expenses of the Association, and an Association charge, to and in such an amount as shall be determined by the Board of Directors of the Association. From this Association charge, organization and other general Association expenses shall be deducted, and with the balance a commercial reserve shall be created.

Whenever any commercial reserve is no longer needed for Association purposes, the Association shall distribute it among the Growers in the proportions to which they are entitled, determined on the basis of the amount retained from each Grower to create such a reserve.

By Section 3 of Article XII of Turlock's bylaws it was provided that a non-assignable Certificate of Membership should be issued to "each member"

who has signed a marketing agreement in the required form. By Section 5 it was provided that each member should have one vote. A membership fee of $10 was payable under Section 8 and the fees so paid were to be retained as a membership fund in cash or in specified assets and by Section 6 it was provided that the property rights and interest of the members in the membersihp fund so established should be equal, each member having "one unit of property right and interest." All other rights, interests and participations were to be according to the patronage or participation of the member in the crop marketing program.

The association charge which under provision 6 of the crop contract was to be deducted by the Co-op when making payment to the member for his crop was covered by Section 9 of Article XII of the bylaws and reads as follows:

> From the Association charge provided for in the marketing agreement, organization and other general association expenses shall be deducted and commercial reserves created, and deductions made for the interest on or retirement of the advance fund in the discretion of the Association.

During the taxable year and up to March 8, 1949, the provision of the bylaws covering the creation and maintenance of the commercial reserve also dealt with in provision 6 of the marketing contract was as follows:

> The association shall create and maintain a commercial reserve. This reserve shall be de-

ducted from the Association charge and shall be used to purchase necessary equipment and property, to provide working capital and for other uses of the Association, including the purchase of stock of any corporation organized for the purpose among other things of manufacturing or selling the products of this Association, and with whom this Association shall contract for the manufacturing of such products.

Certificates shall be issued bearing interest at the rate of six per cent per annum for and on account of the respective interest herein of the members of the Association. If the members do not elect to continue co-operative marketing to the end of the period provided in the marketing agreement, the directors shall sell the assets of the Association, and after deducting and retaining the entire membership fund for distribution equal to memberships, shall distribute the proceeds proportionately to the owners of the certificates then unredeemed.

During 1945, Turlock issued the partnership, Caswell Brothers, two certificates "for and on account of" its interest in the Commercial Reserve Fund. Certificate 1110 in the amount of $2,731.86 was issued February 1, 1945, and was for the 1943 crop. Certificate 1229 in the amount of $4,389.92 was for the 1944 crop. Up to the date of the trial herein neither certificate had been redeemed. The certificates bore interest at 6 per cent per annum and in form were as follows:

Incorporated March 2, 1929

Turlock Co-operative Growers
An Incorporated Co-operative Association
Organized Under the Laws of the
State of California.

This Certifies That .....
is the owner of ..... Dollars
of the Commercial Reserve Fund of the
Turlock Co-operative Growers

Said Commercial Reserve Fund and the interest therein represented by this
Commercial Reserve Fund Certificate

is subject to the provisions of the Articles of Incorporation and Bylaws of this Association and shall be distributed only in accordance with the provisions thereof.

Interest at the rate of ..... per annum shall be paid upon the face value represented by this certificate from date first issued, until called for redemption.

This certificate is transferable upon the books of the Association by the owner or by duly authorized agent upon surrender of this certificate properly endorsed.

Series.....

Date first issued .....

Witness the seal of the Association and the signatures of its duly authorized officers.

Date.....

.....
President.

.....
Secretary-Treasurer.

Wallace Caswell, as an individual was also a member of Turlock, and during 1945 three certificates were issued to him reflecting his interest in the Commercial Reserve Fund. Certificate 1111 in the amount of $140.38 and Certificate 1112 in the amount of $789.72 were issued on February 1, 1945, and were for the 1943 crop. Certificate 1230 in the amount of $1,418.82 was issued on November 1, 1945, and was for the 1944 crop. Up to the date of the trial herein none of these certificates had been redeemed. These certificates bore 6 per cent interest per annum and were in the form set out above.

The Co-op operates on the basis of a fiscal year ending January 31. Its balance sheet as of January 31, 1946, was as follows.

Assets

Current Assets:			
Cash on Hand and in Bank		$82,201.38	
Accounts Receivable—General	$316,364.26		
Accounts Receivable—Growers	9,819.33		
Subsidy Receivable	10,469.67		
Total	336,653.26		
Less: Reserve for Bad Debts	16,828.08	319,825.18	
Inventories:			
Canned Goods—Net Realizable Value	173,596.12		
Materials and Supplies	191,085.16	364,681.28	
Total Current Assets			$766,707.84
Prepaid Expenses:			
Taxes and Insurance		16,576.39	
Plant Reconditioning		48,617.30	
Sundry Prepaid Expenses		2,867.95	
Total Prepaid Expenses			68,061.64

Fixed Assets:	Cost	Reserve for Depreciation	Net Book Value	
Land	9,500.00	.....	9,500.00	
Buildings	253,212.46	41,232.22	211,980.24	
Machinery & Equipment	324,023.89	134,750.73	189,273.16	
Autos and Trucks	18,095.20	13,843.56	4,251.64	
Furniture and Fixtures	5,633.51	4,023.07	1,610.44	
Lub Boxes and Crates	61,852.41	35,261.55	26,590.86	
Field and Orchard Equipment	5,524.55	2,544.71	2,979.84	
Total Fixed Assets	677,842.02	231,655.84	446,186.18	446,186.18
Other Assets:				
Stock in Berkeley Bank for Cooperatives			12,100.00	
Investment—Central Cooperative, Inc.			750.95	
Trade Marks			330.00	
Investment—Canners Service, Inc.			10,000.00	
Advances to Fruit Machinery			13,500.00	
Total Other Assets				36,680.95
Total Assets				$1,317,636.61

Liabilities and Members' Equities

Current Liabilities			
Notes Payable—Berkeley Bank for Cooperatives		$181,915.27	
Current Installment—Facility Loan		15,000.00	
Contracts Payable		5,738.00	
Accounts Payable—Trade		66,011.33	
Accounts Payable—Brokers		13,829.23	
Amount due on Sales and Management Contract		4,832.61	
Called Certificates—Not Paid		980.78	
Sundry Accruals:			
Provision to Ship Goods Billed	$28,269.37		
Payroll	1,878.51		
Interest	16,581.04		
Payroll Taxes	1,980.85		
Sundry Accruals	617.65	49,327.42	
Total Current Liabilities			$337,634.64
Due Growers:			
Total Pool Proceeds—Tentative—Exhibit "C"		769,191.79	
Less:			
Advances to Jan. 31, 1946	417,869.89		
Retains (Tentative) 10% of Proceeds	76,919.18	494,789.07	
Balance due Growers			274,402.72
Facility Loan—Berkeley Bank for Cooperatives		150,000.00	
Less: Current Installment shown above		15,000.00	135,000.00
Members' Equity Accounts:			
Membership Fees		760.00	
Retains—1944 and Prior Pools (Schedule "A-1")		492,920.07	
Retains—1945 Pools (10% of Net Proceeds—Tentative)		76,919.18	
Total Members' Equity Accounts			570,599.25
Total Liabilities and Members' Equities			$1,317,636.61

Turlock renders a financial statement to each of its members at the end of each of its fiscal years but the statement given to members is not broken down into details to the extent shown above.

During a crop year but before harvesting, the Co-op makes advances to its members. When the crop is harvested and delivered to it, the Co-op pays its members in cash as it in turn sells the crop or goods canned from the crop, after deducting for the advances made, less a percentage, usually at 10 per cent, which is withheld by the Co-op and which ultimately is represented by the issuance of certificates. Upon receipt by the Co-op, the crop produced by a member is mixed with similar crops produced by other members and becomes part of one of the pools for that year. As these pools are liquidated by the Co-op, the above-mentioned payments are made. After a pool is liquidated to the extent of 90 per cent or 95 per cent, the pool is closed and certificates are issued for the amounts withheld plus an estimated 10 per cent of the sales price on the remaining 5 per cent or 10 per cent of the pool unsold at the time of its closing. This unsold portion of the pool is carried over to following years and sold without burden of any further expense, the actual expenses of sale being carried entirely by the current year pools.

At the conclusion of the distribution of each commodity pool, a statement is rendered to each of the growers showing the total amount received for the commodity marketed, less any charges that might have been made to him, also less the Reserve Fund

Certificate which up to this time had been issued on the basis of 10 per cent of the net return of the commodity marketed.

The Co-op, from time to time, purchases certain quantities of raw materials from non-members in order to complete pack orders with respect to certain commodities, but the quantities so purchased are small in comparison to the materials supplied by the grower members.

If the financial condition of the Co-op is such that the Board of Directors concludes that a redemption can be made of outstanding certificates, a call is made for the oldest outstanding certificates. Prior to the amendment of Article XIII of the association's bylaws in 1949, certificates were issued and redeemed on the basis of their individual dates of issuance; the amendment requires that they now be issued and redeemed in yearly series. For all times material hereto, the Co-op has paid those certificates which it redeemed on the basis of 100 cents on the dollar. In 1941 the Co-op redeemed the certificates which it issued in 1935 and 1936, and a portion of those issued in 1937. In 1943 it redeemed the remainder of the certificates issued in 1937 and also those issued in 1938 and a portion of those issued in 1939. In 1944 it redeemed the remainder of the certificates issued in 1939 and all of those issued in 1940. In 1945 no certificates were redeemed. In 1946 the Co-op redeemed the certificates issued during the first eight months of 1941. In 1947 it redeemed the remainer of the certificates issued in 1941 and all of those issued in 1942. In

1948 it redeemed certificates issued during the first five months of 1943. No certificates have been redeemed since 1948.

According to the books of Turlock six transfers of certificates were made in 1944 and thirteen in 1945. The circumstances, reasons or considerations for these transfers are not shown of record and do not appear on the books of the Co-op.

Interest rates on the certificates are now fixed by the Board of Directors of the Co-op. Certificates issued currently carry interest at 3 per cent, whereas earlier certificates, including those for the year 1945, carried an interest rate of 6 per cent.

All of the assets of Wallace Caswell and Charles Henry Caswell were inherited by them from their father, prior to 1945, or were the proceeds of rents, profits or increments from such assets. Their interest in Caswell Brothers, a partnership, produced distributive income to each of them in 1945 in the amount of $14,870.79 which included their interest in the issuance of Turlock Growers Association Certificates in the amount of $7,121.78 during that year. Personal services were also rendered by them in the production of said income. Another asset, their interest in the partnership of W. & C. H. Caswell produced distributive income to each of them in 1945 in the amount of $1,091.57, and to the production of such income they contributed personal services. Wallace Caswell and Charles Henry Caswell were members of a partnership, Caswell Manufacturing Company of Cherokee, Iowa, to which they rendered no personal services, and in

1945 they each had distributive income in the amount of $10,000 from said partnership which was separate, as distinguished from community income. During the year 1945, Wallace Caswell also received as income, the amount of $7,598.17 from the operation of a farm to which he contributed personal services, and Charles Henry Caswell received income in the amount of $1,975.91 from the operation of a farm to which he contributed personal services. All of said personal services were in the conduct of farming operations.

The fair market value of the certificates issued by Turlock in 1945 on its Commercial Reserve Fund to Wallace Caswell and to the partnership, Caswell Brothers, was equal to the face value of the respective certificates.

In his determination of the deficiencies herein the respondent included in gross income the face amount of the certificates issued in the taxable year. In his notices of deficiency the amounts so included in gross income were shown as representing the fair market value of the said certificates.

The argument of the petitioners is twofold, the first contention being that since they reported their income on the cash basis and since at no time during the taxable year did they actually receive or become unqualifiedly entitled to receive payment of the moneys in the commercial reserve covered by the certificates issued, they did not constructively, or otherwise, receive or realize income by reason of their receipt of the certificates. Their second contention is that in any event the certificates had no

fair market value when issued and accordingly there was upon their receipt no realization of gain under section 111 (b) of the Internal Revenue Code[1] as determined and claimed by the respondent.

As to the argument on constructive receipt, it is to be noted that there are statements in some of the decided cases which may well be regarded as authority for the proposition that moneys carried to capital reserves by co-operative associations under comparable terms and conditions have already been constructively received by the members of the Co-op since it is said that such funds in reality belong to the members and not the Co-op. San Joaquin Valley Poultry Producers Association vs. Commissioner, 136 F(2d) 382; Colony Farms Co-operative Dairy, Incorporated, 17 T.C.....; George Bradshaw, 14 T.C. 162; and Harbor Plywood Corporation, 14 T.C. 158. And, there might even be stronger reasons for applying such a rule in this case since for 1945, at least, Turlock was exempt from income tax under section 101 of the Internal Revenue Code, whereas some, if not all, of the co-ops involved in the cases cited were not exempt. In Dr. P. Phillips Cooperative, 17 T.C. ....., however, a co-operative which was subject to

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[1]Sec. 111. Determination of Amount of, and Recognition of, Gain or Loss.

* * *

(b) Amount Realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

tax, we declined to extend the conduit theory to cover the moneys carried into a reserve where it was not shown that the certificates issued against the reserve were issued "pursuant to a pre-existing obligation or liability," and in George Bradshaw, supra, after acknowledging the conduit doctrine, we held that it was the issuance of the notes by the Co-op which fixed the rights of the patrons in the moneys covered thereby and not the closing by the Co-op of the transactions from which the moneys in question were derived.

In the instant cases the respondent does not rely on the conduit theory nor on any other variation of the theory of constructive receipt but has determined and contends that the Caswells in payment for their peaches, and in addition to the cash distributed, received other property, namely, the certificates, and under section 111 (b) supra, received and realized income to the extent of the fair market value of the certificates at the time of issue, and further that the fair market value of the certificates was equal to face. It is thus apparent that no issue has been joined here involving any question of constructive receipt of the moneys in the commercial reserve.

The decision, in our opinion, must be for the respondent. Whether the certificates received be likened to debentures or evidences of indebtedness or to shares of preferred stock or be said to evidence a more direct ownership of the designated amount of the commercial reserve, they were none the less securities evidencing valuable rights or in-

terest in the commercial reserve which belonged to the Caswells and which without restriction, other than that the transfers thereof be recorded on Turlock's books, could be sold, traded in or assigned and not only could such certificates be assigned and transferred but the record indicates that transfers thereof were usual and customary, six of such transfers having been recorded in 1944 and thirteen during 1945, the taxable year herein. And, while they had no specified due date or dates they bore interest at 6 per cent per annum on the face amount and there is no showing or claim that the interest was not regularly paid when due. Furthermore, the record also indicates a practice on the part of Turlock of retiring or redeeming outstanding certificates at face before too many years had elapsed. Presumably, subsequent additions to the commercial reserve from the proceeds of later crop pools would adequately provide for the capital needs of the association and thereby permit the prior certificates to be retired or redeemed. It is our opinion, and we conclude, that the certificates meet the requirements of section 111 (b), supra, and that they represented income to the petitioners at the time of issue to the extent of their fair market value.

As to the fair market value the decision also must be for the respondent. The petitioners rest their claim of no fair market value on three things (1) that the certificates had no specified due date, (2) that although assignable, they were not negotiable instruments; and (3) that two local bankers, if called as witnesses, would have testified that from

a banking standpoint the certificates were not classified as marketable, that their purchase would have been on a speculative basis and in instances where they were accepted as collateral for loans they were accepted as "additional collateral" only.

To the contrary, Turlock's balance sheet gives every indication that the value back of the certificates covered them at face. The interest provided was at a very attractive rate. There was no indication that Turlock had ever defaulted on interest payments and it has an apparent record of redemption of such certificates without undue delay. Furthermore, in light of the transfers of certificates recorded on Turlock's books in 1944 and 1945, we think it reasonable to assume that the certificates were traded and exchanged even though the consideration or occasion for the transfers recorded is not shown. It is shown also that Turlock was known in the community as being in sound condition and well managed. In such circumstances we think it clear that the certificates from the date of their issuance not only had fair market value but the record gives no leeway for saying that such fair market value was less than face. See and compare George Bradshaw, supra, and P. Phillips, et al., 17 T.C.....

Decisions will be entered under Rule 50.

Served January 18, 1952.

The Tax Court of the United States
Washington

Docket No. 27017

ESTATE OF WALLACE CASWELL, Deceased,
Jennie J. Caswell, Administratrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court promulgated January 18, 1952, the respondent on March 11, 1952, having filed a proposed recomputation of the tax involved, in accordance therewith, and the petitioner on April 4, 1952, having filed an acquiescence in such recomputation, it is

Order and Decided: That there is a deficiency in income tax for the year 1945 in the amount of $7,828.97.

[Seal] /s/ BOLON B. TURNER,
Judge.

Entered May 5, 1952.

Served May 5, 1952.

The Tax Court of the United States
Washington

Docket No. 27018

ESTATE OF CHARLES HENRY CASWELL, Deceased, Earl W. Caswell, Administrator,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court promulgated January 18, 1952, the respondent on March 11, 1952, having filed a proposed recomputation of the tax involved, in accordance therewith, and the petitioner on April 4, 1952, having filed an acquiescence in such recomputation, it is

Order and Decided: That there is a deficiency in income tax for the year 1945 in the amount of $5,278.10.

[Seal] /s/ BOLON B. TURNER,
Judge.

Entered May 5, 1952.

Served May 5, 1952.

[Title of Tax Court and Cause.]

Docket Nos. 27017 and 27018

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the following facts shall be taken to be true and received in evidence in the above-entitled proceedings, together with all exhibits attached hereto and made a part hereof, and that it shall constitute all facts, other than admitted in the answer to be presented in this proceeding.

Petitioner in docket number 27017 hereby concedes the issues raised in subsections (a), (d) and (e) of paragraph 4 of the petition.

Petitioner in docket number 27018 hereby concedes the issues raised in subsections (b) and (c) of paragraph 4 of the petition.

1. The Estate of Wallace Caswell, by Jennie J. Caswell, Administratrix, is the duly qualified petitioner in docket number 27017. Wallace Caswell, until his death on December 3, 1949, and for the years material hereto, was a resident of Ceres, Stanislaus County, California.

He filed his income tax return for the taxable year 1945 with the Collector of Internal Revenue for the First District of California.

2. In the year 1945, Wallace Caswell filed his return on the cash receipts and disbursements basis and reported all income as the community income

of himself and wife, Jennie J. Caswell, with whom he was married at all times material hereto.

3. The Estate of Charles Henry Caswell, by Earl W. Caswell, Administrator, is the duly qualified petitioner in docket number 27018. Charles Henry Caswell, until his death on June 26, 1949, and for the years material hereto, was a resident of Ceres, Stanislaus County, California.

He filed his income tax return for the taxable year 1945 with the Collector of Internal Revenue for the First District of California.

4. In the year 1945, Charles Henry Caswell filed his return on the cash receipts and disbursement basis and reported all income as the community income of himself and wife, Helen C. Caswell, with whom he was married at all times material hereto.

5. Wallace Caswell and Charles Henry Caswell each had a one-half interest in the partnership of Caswell Brothers, Ceres, California. This partnership was a member of the Turlock Co-operative Growers Association. During the year 1945, the Caswell Brothers were issued two Certificates of the Turlock Co-operative Growers Association as follows: Certificate 1110 issued February 1, 1945, in the amount of $2,731.86. Certificate 1229 issued November 1, 1945, in the amount of $4,389.92. Certificate 1110 was issued for the 1943 crop of peaches and certificate 1229 was issued on the 1944 crop of peaches supplied by the partnership. Neither certificate has to date been redeemed. These certificates were in the form of exhibit 1 attached hereto, and called for interest at the rate of 6%.

6. During the year 1945, Wallace Caswell was issued three certificates of the Turlock Co-operative Growers Association as follows: Certificate number 1111, issued February 1, 1945, in the amount of $140.38. Certificate number 1112 issued February 1, 1945, for $789.72. Both of these were on the 1943 crop, and neither one has to date been redeemed. Certificate number 1230 was issued on November 1, 1945, in the amount of $1,418.82 on the 1944 crop of peaches, and this has not to date been redeemed. These certificates were in the form of exhibit 1 attached hereto and call for interest at the rate of 6%.

7. The Turlock Co-operative Growers (referred to here as "the Co-operative") is a farmers' co-operative exempt under Section 101 of the Internal Revenue Code during the years of issue, and is located at Modesto, California. Its articles of incorporation and bylaws are attached hereto as Exhibit 2. Exhibit 2 reflects an amendment to Article XIII of the bylaws which was adopted on March 8, 1949. Prior thereto and during the year 1945, Article XIII was worded as follows:

> "The association shall create and maintain a commercial reserve. This reserve shall be deducted from the Association charge and shall be used to purchase necessary equipment and property, to provide working capital and for other uses of the Association, including the purchase of stock of any corporation organized for the purpose among other things of manu-

facturing or selling the products of this Association, and with whom this Association shall contract for the manufacturing of such products.

"Certificates shall be issued bearing interest at the rate of six per cent per annum for and on account of the respective interest herein of the members of the Association. If the members do not elect to continue co-operative marketing to the end of the period provided in the marketing agreement, the directors shall sell the assets of the Association, and after deducting and retaining the entire membership fund for distribution equal to memberships, shall distribute the proceeds proportionately to the owners of the certificates then unredeemed."

The Co-operative operates on a fiscal year basis ending January 31, and its balance sheet as of January 31, 1946, obtained by the respondent, is attached hereto as Exhibit 3. It executes crop contracts with its members for the purchase of crops grown by the members, and a copy of the form used for such contract is attached hereto as Exhibit 4.

8. During a crop year but before harvesting, the Co-operative makes advances to its members. When the crop is harvested and delivered to it, the Co-operative pays its members in cash as it in turn sells the crop or goods canned from the crop, after deducting for the advances made, less a percentage, usually at 10%, which is withheld by the Co-opera-

tive and which ultimately is represented by the issuance of certificates. Upon receipt by the Co-operative, the crop produced by a member is mixed with similar crops produced by other members and becomes part of one of the pools for that year. As these pools are liquidated by the Co-operative, the above-mentioned payments are made. After a pool is liquidated to the extent of 90% or 95%, the pool is closed and certificates are issued for the amounts withheld plus an estimated 10% of the sales price on the remaining 5% or 10% of the pool unsold at the time of its closing. This unsold portion of the pool is carried over to following years and sold without burden of any further expense, the actual expenses of sale being carried entirely by the current year pools.

9. Attached hereto and marked Exhibit 5 are copies of two letters, signed by officers of two local banks. The statements contained therein represent the opinions of the writers and they would so testify if they were called as witnesses in these proceedings.

10. The recording of the transfers of these certificates by assignment on the books of the Co-operative do not indicate the circumstances surrounding the transfer such as settlement of estate, marital settlements, credit settlements, etc., nor the amount received by the member for the transfer on a sale. Six such transfers were made in the year 1944 and thirteen in the year 1945.

11. The Co-operative Association renders a financial statement to each of its members at the end of each of its fiscal years. These statements are in the form of the statement attached hereto as Exhibit 6. At the conclusion of the distribution of each commodity pool, a statement is rendered to each of the growers showing the total amount received for the commodity marketed, less any charges that might have been made to him, also less the Reserve Fund Certificate which up to this time had been issued on the basis of 10% of the net return of the commodity marketed.

12. The Co-operative, from time to time, purchases certain quantities of raw materials from non-members in order to complete pack orders with respect to certain commodities, but the quantities so purchased are small in comparison to the materials supplied by the grower members.

13. If the financial condition of the Co-operative is such that the Board of Directors concludes that a redemption can be made of outstanding certificates, a call is made for the oldest outstanding certificates. (Prior to the amendment of Article XIII of the association's bylaws in 1949, certificates were issued and redeemed on the basis of their individual dates of issuance; the amendment requires that they now be issued and redeemed in yearly series.) For all times material hereto the Co-operative has paid those certificates which it redeemed on the basis of 100 cents on the dollar. In 1941 the Cooperative redeemed the certificates which it issued in 1935

and 1936, and a portion of those issued in 1937. In 1943 it redeemed the remainder of the certificates issued in 1937 and also those issued in 1938 and a portion of those issued in 1939. In 1944 it redeemed the remainder of the certificates issued in 1939 and all of those issued in 1940. In 1945 no certificates were redeemed. In 1946 the Co-operative redeemed the certificates issued during the first eight months of 1941. In 1947 it redeemed the remainder of the certificates issued in 1941 and all of those issued in 1942. In 1948 it redeemed certificates issued during the first five months of 1943. No certificates have been redeemed since 1948.

14. Interest rates on the certificates are fixed by the Board of Directors of the Co-operative. Certificates issued currently carry interest at 3%, whereas on earlier certificates and including those for the year 1945, the interest rate was 6%.

15. All of the assets of Wallace Caswell and Charles Henry Caswell were inherited by them from their father, prior to 1945, or were the proceeds of rents, profits or increments from such assets. Their interest in Caswell Brothers, a partnership, produced distributive income to each of them in 1945 in the amount of $14,870.79 which included their interest in the issuance of Turlock Growers Association Certificates in the amount of $7,121.78 during that year. Personal services were also rendered by them in the production of said income. Another asset, their interest in the partnership of W. & C. H. Caswell produced distributive

income to each of them in 1945 in the amount of $1,091.57, and to the production of such income they contributed personal services. Wallace Caswell and Charles Henry Caswell were members of a partnership, Caswell Manufacturing Company of Cherokee, Iowa, to which they rendered no personal services, and in 1945 they each had distributive income in the amount of $10,000 from said partnership which was separate, as distinguished from community income. During the year 1945, Wallace Caswell also received as income, the amount $7,598.17 from the operation of a farm to which he contributed personal services, and Charles Henry Caswell received income in the amount of $1,975.91 from the operation of a farm to which he contributed personal services. All of said personal services were in the conduct of farming operations.

16. In stipulating facts herein concerning the Turlock Co-operative Growers, respondent does not concede the relevancy of any such facts relating to years subsequent to 1945.

/s/ WAREHAM C. SEAMAN,
Attorney for Petitioners.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

EXHIBIT No. 1

[Commercial Reserve Fund Certificate]
[Void]

Incorporated March 2, 1929

1223 $285.15

Turlock Co-operative Growers
An Incorporated Co-operative Association
Organized Under the Laws of the
State of California

This Certifies That ~~Julius Horning~~ Leask is the owner of Two Hundred Eighty-five and 15/100 Dollars of the Commercial Reserve Fund of the

Turlock Co-operative Growers

Said Commercial Reserve Fund and the interest therein represented by this

Commercial Reserve Fund Certificate

is subject to the provisions of the Articles of Incorporation and Bylaws of this Association and shall be distributed only in accordance with the provisions thereof.

Interest at the rate of Six per cent per annum shall be paid upon the face value represented by this certificate from date first issued, until called for redemption.

This certificate is transferable upon the books of the Association by the owner or by duly authorized agent upon surrender of this certificate properly endorsed.

Series 1942 "26"

Date first issued: September 1, 1943.

Witness the seal of the Association and the signatures of its duly authorized officers.

Dated: April 18, 1945.

1942 Tomatoes.

.....

Secretary-Treasurer.

/s/ C. M. MOFFET,

President.

EXHIBIT No. 3

Turlock Cooperative Growers
Balance Sheet as at January 31, 1946

Assets

Current Assets:			
Cash on Hand and in Bank		$82,201.38	
Accounts Receivable—General	$316,364.26		
Accounts Receivable—Growers	9,819.33		
Subsidy Receivable	10,469.67		
Total	336,653.26		
Less: Reserve for Bad Debts	16,828.08	319,825.18	
Inventories:			
Canned Goods—Net Realizable Value	173,596.12		
Materials and Supplies	191,085.16	364,681.28	
Total Current Assets			$766,707.84
Prepaid Expenses:			
Taxes and Insurance		16,576.39	
Plant Reconditioning		48,617.30	
Sundry Prepaid Expenses		2,867.95	
Total Prepaid Expenses			68,061.64

	Cost	Reserve for Depreciation	Net Book Value	
Fixed Assets:				
Land	9,500.00	.....	9,500.00	
Buildings	253,212.46	41,232.22	211,980.24	
Machinery and Equipment	324,023.89	134,750.73	189,273.16	
Autos and Trucks	18,095.20	13,843.56	4,251.64	
Furniture and Fixtures	5,633.51	4,023.07	1,610.44	
Lub Boxes and Crates	61,852.41	35,261.55	26,590.86	
Field and Orchard Equipment	5,524.55	2,544.71	2,979.84	
Total Fixed Assets	677,842.02	231,655.84	446,186.18	446,186.18
Other Assetts:				
Stock in Berkeley Bank for Cooperatives			12,100.00	
Investment—Central Cooperative, Inc.			750.95	
Trade Marks			330.00	
Investment—Canners Service, Inc.			10,000.00	
Advances to Fruit Machinery			13,500.00	
Total Other Assets				36,680.95
Total Assets				$1,317,636.61

TURLOCK COOPERATIVE GROWERS

Balance Sheet as at January 31, 1946
Liabilities and Members' Equities

Current Liabilities			
Notes Payable—Berkeley Bank for Cooperatives		$181,915.27	
Current Installment—Facility Loan		15,000.00	
Contracts Payable		5,738.00	
Accounts Payable—Trade		66,011.33	
Accounts Payable—Brokers		13,829.23	
Amount due on Sales and Management Contract		4,832.61	
Called Certificates—Not Paid		980.78	
Sundry Accruals:			
Provision to Ship Goods Billed	$28,269.37		
Payroll	1,878.51		
Interest	16,581.04		
Payroll Taxes	1,980.85		
Sundry Accruals	617.65	49,327.42	
Total Current Liabilities			$337,634.64
Due Growers:			
Total Pool Proceeds—Tentative—Exhibit "C"		769,191.79	
Less:			
Advances to Jan. 31, 1946	417,869.89		
Retains (Tentative) 10% of Proceeds	76,919.18	494,789.07	
Balance due Growers			274,402.72
Facility Loan—Berkeley Bank for Cooperatives		150,000.00	
Less: Current Installment shown above		15,000.00	135,000.00
Members' Equity Accounts:			
Membership Fees		760.00	
Retains—1944 and Prior Pools (Schedule "A-1")		492,920.07	

Retains—1945 Pools (10% of Net Proceeds—Tentative)	76,919.18	
Total Members' Equity Accounts		570,599.25
Total Liabilities and Members' Equities		$1,317,636.61

I, hereby, certify the above to be a true and correct copy of an audit report issued to us by the Wayne Mayhew & Company, for the year 1945.

Signed L. E. NEEL, Secretary.

EXHIBIT No. 4

Duplicate

Turlock Co-operative Growers
Crop Contract

This Agreement, made this 9th day of February, 1942, between the Turlock Co-operative Growers, a non-profit, co-operative Association, incorporated under the laws of the State of California, hereinafter called the Association, and Caswell Brothers, hereinafter called the Grower, Witnesseth:

That the Association does hereby purchase and the Grower does hereby sell all of the crop or crops (hereinafter referred to as commodities) listed below to be produced during the years 1942-3-4 on the following described land in Stanislaus County, California, to wit:

50 Acres in N.W. ¼ of Sec. 11, Township 4, Range 9, Northeast ¼

Ranch No. 1

Crops by commodities:

Midsummer Peaches: Acres 50.

(20 acres Paloras)
(15 acres Guams)
(15 acres Halfords)

At and for the prices net to the Grower determined as hereinafter set forth.
The Terms and Conditions printed on the back hereof are a part of this contract.

In Witness Whereof, the parties hereto have executed this contract in duplicate the day and year first above written.

TURLOCK CO-OPERATIVE GROWERS,

By /s/ [Indistinguishable]
CASWELL BROTHERS,

By.....
Grower.

Address: Ceres, California.

.....
Witness to Grower's Signature.

Address: .....

EXHIBIT No. 5

[Copy]

Modesto Bank & Trust Co.
Modesto, California

September 22, 1949

Mr. W. P. Garrison,
Room 2, Black Building,
1115 Eye Street,
Modesto, California.

Dear Mr. Garrison.

Re: Turlock Co-operative Growers' Certificates

We are familiar with the above-titled Certificates and in response to your inquiry, wish to advise.

These certificates are not acceptable to banks as collateral security for loans, which could not be granted on the basis of other satisfactory conditions. In a few instances of marginal cases these certificates will be taken with other security as additional collateral, but, never as a determining factor.

Under the Banking Laws of California we are prohibited from buying such Certificates, but, if it were permitted we would not consider purchasing them due to the fact they do not carry a guarantee value nor a redemption date.

It is our opinion that the purchase of the above Certificates would be on a speculative basis.

Yours very truly,

/s/ C. R. PETERSON,
Executive Vice President.

[Duplicate]

Bank of America
National Trust and Savings Association

Modesto, California,
September 28, 1949.

Mr. W. P. Garrison,
Room 2, Black Building,
1115 Eye Street,
Modesto, California.

Dear Mr. Garrison:

Re: Turlock Co-operative Growers

For several years, we have known and been rather intimately acquainted with the Commercial Reserve Fund Certificates issued to various and sundry growers of the Turlock Co-operative Growers.

It has not been our practice to accept these certificates as collateral to loans by reason of the fact that they do not possess specific maturity dates. It has always been our belief that the question of payment lies within the province of the Board of Directors. In other words, at the date of issue of said certificates, even though the balance sheets disclosed ample funds, yet by redemption period, if the corporation saw fit to use said funds for any other purpose in the operation of its business, then said payments would naturally be preferred.

We recognize the fact that these certificates are assignable.

We further recognize the fact that the Turlock Co-operative Growers, under the able management

of its officers, has made great strides in its field, and enjoys a magnificent reputation in the canning business; nevertheless, from a banking standpoint, the certificates are not classified as marketable securities. They, naturally, differ from any other common or preferred stock which are either listed on the local exchanges, or on the New York Stock Exchange.

Very truly yours,

A. E. PUCCINELLI,
Vice President & Manager.

AEP:VS

EXHIBIT No. 6

TURLOCK COOPERATIVE GROWERS
Financial Statement January 31, 1950

Assets

	1/31/49	1/31/50
Cash on Hand	$ 113,530.67	$ 56,991.20
Accounts Receivable	399,318.23	305,517.44
Inventory		
Canned Goods (less shipping)	2,383,824.26	3,315,310.44
Material and Supplies	169,853.86	187,888.21
Real Estate, Plant and Equipment	761,220.42	811,155.70
Stock: Berkeley Bank for Cooperatives	29,200.00	32,800.00
Deferred Charges and Investments	75,945.86	127,540.23
	$3,932,893.30	$4,837,203.22

Liabilities and Net Worth

Accounts Payable	$ 106,691.10	$ 449,606.90
Commodity Loan B.B.F.C.	1,702,059.31	1,846,195.29
Merchandising Loan B.B.F.C.	168,882.96	400,000.00
Facility Loan B.B.F.C.	140,000.00	187,000.00
Term Operating Loan	43,750.00	37,500.00

Reserve for Bad Debts and Sundry Accruals	38,942.13	29,526.40
Growers Undistributed Equities	921,593.80	882,557.81
Consigned Goods Loan		50,000.00
Net Worth		
Membership Fund	830.00	1,610.00
Commercial Reserve (including 1949 estimated reserve)	810,144.00	953,206.82
	$3,932,893.30	$4,837,203.22

[Endorsed]: Filed November 13, 1950.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

I.

Jurisdiction

The Estate of Wallace Caswell, deceased, Jennie J. Caswell, Administratrix, your petitioner on review, hereinafter referred to as the "petitioner," respectfully petitions this honorable Court to review the decision of The Tax Court of the United States entered on the fifth day of May, 1952, and finding as follows: That there was a deficiency in the petitioner's income tax for the year 1945, in the amount of $5,278.10 instead of no deficiency of such

taxes as claimed by the petitioner in the proceeding before the said Tax Court.

Your petitioner is a fiduciary acting for and on behalf of the estate of her deceased husband with offices at and residing at Ceres, Stanislaus County, California. Hereinafter the term "petitioner" denotes either the fiduciary or the deceased during his lifetime, whichever is appropriate. The respondent on review, hereinafter referred to as the "respondent," is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States of America.

The income tax return in respect of which the aforementioned taxes were paid and in respect of which the aforementioned deficiency and tax liability arose was filed by your petitioner with the Collector of Internal Revenue for the First District of California, located in the City of San Francisco, State of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction in the said Court of Appeals to review the above-described decision of The Tax Court of the United States is founded on sections 1141, 1142, and 1143 of the Internal Revenue Code (Pt. 1, 53 U.S. Statutes at L.; Title 26, United States Code), as amended by section 36, Act of June 25, 1948 (62 U.S. Statutes at L. 991).

II.

Nature of Controversy

During the year 1945 petitioner was engaged in the occupation of farming in Stanislaus County, California. A substantial portion of his crops consisted of peaches and were marketed through the Turlock Co-operative Growers located at Modesto, California, of which he was a member. Turlock Co-operative Growers Association, hereinafter called "co-operative," was a farmers' marketing co-operative organized under the laws of California and exempt under section 101 of the Internal Revenue Code. Approximately ninety per cent of the sale or market price of the peaches customarily was paid by the Co-operative to the petitioner and other member-suppliers during the crop year. The remaining ten per cent was usually, in the following year or two, represented by the issuance of Certificates of Indebtedness of the Co-operative to the petitioner. Such Certificates, showing no maturity date, were payable at the discretion of the directors of the Co-operative, with simple interest at six per cent per annum, payable when the certificates were redeemed. The first portion of those certificates issued in 1937 were redeemed in 1941. The last portion of the certificates issued in 1943 had not been redeemed by November 13, 1950, or twice the period before the redemption of the certificates of 1937.

Petitioner at all times material hereto had reported income on the basis of cash receipts and disbursements. Petitioner reported as income the proceeds of certificates in the year of redemption

rather than the face value at the date of issuance.

During the year 1945 the petitioner had one-half interest in a partnership to which was issued a certificate in the face amount of $2,731.86 on the 1943 crop of peaches and a certificate in the face amount of $4,389.92 on the 1943 crop of peaches. As an individual, the petitioner in 1945 was issued two certificates for the 1943 crop of peaches, one in the face amount of $140.38 and the other in the face amount of $789.72, and was also issued a certificate in the face amount of $1,418.82 on the 1944 crop of peaches. None of the aforementioned certificates have been redeemed at the date of the hearing of this proceeding before the Tax Court of the United States on November 13, 1950.

The respondent determined that the amounts of the distributive shares were taxable as ordinary income to the petitioner in the year 1945, the year of issuance, as amounts realized from the sale of the crop pursuant to section 111(b), Internal Revenue Code. In the proceeding of the Tax Court of the United States for redetermination of the said deficiency, the case was submitted solely on a stipulation of facts, and no oral testimony was introduced by either party. That Court sustained the determination of the respondent.

The petitioner contended, pursuant to section 22(a), Internal Revenue Code, particularly with reference to section 29.22 (a), 7 Regulations 111, with reference to gross income of farmers, that the issuance of the certificates did not represent constructive receipt or the equivalent of cash, because petitioner had not become unqualifiedly entitled to re-

ceive payment of the face value of the certificate.

Petitioners, in the alternative, contended that the certificates had no fair market value when issued because of the absence of maturity date and the lack of an unqualified obligation on the part of the Co-operative to redeem the certificate, and for other reasons set forth. In the proceeding in the Tax Court of the United States that Court found that the certificates had a fair market value equal to the face amount of the certificates.

III.

Prayer

That the petitioner, being aggrieved by the findings of fact and conclusions of law contained in the findings of fact and opinion entered by the Tax Court of the United States in the said proceeding on January 8, 1952, under its docket No. 21017 and its decision entered pursuant thereto on May 5, 1952, prays that this honorable Court of Appeals may review the said findings of and conclusions of law and determine that they have been made and entered in error according to the following assignments of error.

IV.

The petitioner assigns as error the following acts and omissions of the Tax Court of the United States in the said proceeding:

1. The finding that the issuance of the Certificates of Indebtedness to the petitioner in 1945 represented income to him that year.

2. The finding that the fair market value of the Certificates of Indebtedness was equal to their face amounts at the date of issue in 1945.

/s/ WAREHAM C. SEAMAN,
SEAMAN & DICK,
Attorney for Petitioner.

Duly verified.

Received and filed T.C.U.S., August 4, 1952.

PETITION FOR REVIEW

No. 27018

[Clerk's note: A petition for review, assigning the same errors as set forth in the petition for review filed in Estate of Wallace Caswell, was filed in Estate of Charles Henry Caswell, on August 4, 1952.]

[Title of Tax Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Petition for review heretofore filed by the petitioner in the above-entitled cause, a transcript

of the record in the above-entitled cause, prepared and transmitted as required by law and by the rules of the said Court, and to include in the said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before The Tax Court of the United States.

2. Pleadings before The Tax Court of the United States as follows:

(a) Petition for redetermination;

(b) Answer of the respondent.

3. The findings of fact and opinion of the Tax Court of the United States.

4. The decision of the said Court.

5. The stipulation of facts filed November 13, 1950, with all exhibits attached thereto.

6. The petition for review filed by the petitioner.

7. This praecipe.

You are also requested to transmit to the said Clerk of the said Court of Appeals the original stenographic transcript of the proceedings of the Division of the Tax Court of the United States in this cause held and had at San Francisco, California, on November 13, 1950.

/s/ WAREHAM C. SEAMAN,
SEAMAN & DICK,
Counsel for the Petitioner.

Received and filed T.C.U.S., August 4, 1952.

[Title of Tax Court and Cause.]

Docket Nos. 27017 and 27018

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 19, inclusive, constitute and are all of the original papers and proceedings before The Tax Court of the United States as set forth in the "Praecipe for Record" on file in my office as the original record in the above-entitled proceedings and in which the petitioners in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 15th day of August, 1952.

[Seal] /s/ RALPH A. STARNES,

Chief Deputy Clerk, The Tax Court of the United States.

[Endorsed]: No. 13523. United States Court of Appeals for the Ninth Circuit. Estate of Wallace Caswell, deceased, Jennie J. Caswell, Administratrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent; and Estate of Charles Henry Caswell, deceased, Earl W. Caswell, Administrator, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed August 29, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13523

ESTATE OF WALLACE CASWELL, Deceased, JENNIE J. CASWELL, Administratrix,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ESTATE OF CHARLES HENRY CASWELL, Deceased, EARL W. CASWELL, Administrator,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Now comes the petitioners, the Estate of Wallace Caswell, Deceased, and the Estate of Charles Henry Caswell, Deceased, by their attorney as undersigned, and state that the points on which they intend to rely as to the relief sought in this proceeding for review of the decision of the Tax Court of the United States, are as set forth in section IV of the

said petitions for review, the finding by the Tax Court that the issuance of Certificates of Indebtedness to the petitioners in 1945 represented income to them in that year, and the finding that the fair market value of the Certificates of Indebtedness was equal to their face amount at the date of issue in 1945.

The said petitioners having been granted a motion to consolidate for briefing and hearing, it is requested that only the record of the Estate of Wallace Caswell, Deceased, be included in the designation below of the record to be printed, and that the record of the Estate of Charles Henry Caswell, Deceased, be included therein only by reference.

The said petitioners designate as material to the consideration of the review subject of this proceeding all those parts of the records described in the petitioner Estate of Wallace Caswell, Deceased, praecipe for record under items one to seven, inclusive, of that document, this statement and designation, all of which items and exhibits are properly to be included in the record to be printed in this proceeding.

/s/ WAREHAM C. SEAMAN,
Attorney for Petitioners.

[Endorsed]: Filed October 1, 1952.

[Title of Court of Appeals and Cause.]

MOTION TO CONSOLIDATE FOR BRIEFING AND HEARING

Appellants by their attorney, Wareham C. Seaman, move to consolidate their cases for briefing and hearing, on the ground that the issues are identical. In each, the question is whether the Certificates of Indebtedness issue to the Appellants in 1945 represented income in that year, and if so, what was the fair market value of the Certificate of Indebtedness to be included in the taxable income of each for the year 1945. The cases were so consolidated and tried in the Tax Court, with a common stipulation of all the facts.

/s/ WAREHAM C. SEAMAN,
Attorney for Appellants.

So Ordered:

/s/ ALBERT LEE STEPHENS,
/s/ WM. HEALY,
/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed October 2, 1952.

No. 13523

United States Court of Appeals
for the Ninth District

ESTATE OF WALLACE CASWELL, Deceased; JENNIE J. CASWELL, Administratrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

and

ESTATE OF CHARLES HENRY CASWELL, Deceased; EARL W. CASWELL, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Brief for Petitioners

On Petition to Review Decisions
of the Tax Court of the United States

Wareham C. Seaman
Attorney for the Petitioners

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Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

and

ESTATE OF CHARLES HENRY CASWELL, Deceased; EARL W. CASWELL, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Brief for Petitioners
On Petition to Review Decisions
of the Tax Court of the United States

Wareham C. Seaman
Attorney for the Petitioners

STATEMENT OF THE CASE

These are petitions to review determinations of the Tax Court of the United States (R. 40, 41) that there are deficiencies in the income tax of the petitioners for the year 1945 in the amount of $7,828.97 for the Estate of Wallace Caswell and in the amount of $5,278.10 for the Estate of Charles Henry Caswell, under the provisions of section 1141, 1142, and 1143 of the Internal Revenue Code (Pt. 1, 53 U. S. Stat. at L.; Title 26, United States Code), as amended by section 36, Act of June 25, 1948 (62 U. S. Stat. at L. 991; Suppl. II, United States Code, 1946 Ed, p. 684). The opinion of the Tax Court (R. 20) is reported at 17 TC 1190.

The asserted definciencies are based upon the inclusion, by the respondent in the income of the petitioners, of amounts represented by the issuance of Certificates of Indebtedness of a cooperative in the year 1945, at their face value. The petitioners, being on a cash basis, had heretofore included the amounts represented by the Certificates of Indebtedness as income in the year of payment or redemption, rather than in the year of issue as insisted upon by the respondent.

As a second and additional issue in this case, petitioners claim that should it be found that the amounts represented by the Certificates of Indebtedness are taxable in the year of issue, the amounts are taxable to the extent of the fair market value of the certificates, and that they have no fair market value.

The Respondent found such certificates to have a fair market value equal to their face value.

The findings of the respondent were confirmed by the Tax Court in its finding of fact (R. 20), and the validity of that finding on the basis of the stipulation of facts (R. 42-60) is the issue in these petitions for review.

FACTS INVOLVED

All the facts in this case were stipulated (R. 42-60) and in summary these facts are as follows:

Petitioners were individuals engaged in the farming business, reporting their income on the cash receipts and disbursement basis. Petitioners were brothers and marketed their peach crop as partners through the Turlock Cooperative Growers Association, a farmer's marketing association (Exhibit 2, first paragraph) located at Modesto, California, of which they were members, pursuant to a crop contract (Exhibit 4, R. 55) which is executed between the Cooperative and the Grower, whether a member or not (R. 47). Title to the crop passes to the Cooperative before harvesting (Exhibit 4, reverse). Peaches from all growers were placed in a pool and as sold the proceeds were paid to the grower, less an amount withheld by the Cooperative which is ultimately represented by the issuance of Certificates of Indebtedness, usually in the following year. (R. 45 and Exhibit 1, R. 50-51). These certificates for the year involved call for interest of six percent (6%) per annum payable upon redemption of the certificate

(Exhibit 1, R. 50). The certificates are redeemable at the sole discretion of the Board of Directors of the Cooperative (R. 47 and Exhibit 2, Art. XIII). The Certificates at issue, issued in 1945 on the 1944 crop (R. 44), had not, at the time of stipulation, November 13, 1950 (R. 60) been redeemed (R. 44). Nor had those certificates issued after June 1, 1943 been redeemed, and there had been no redemptions since 1948 (R. 48), although prior to that time, redemptions were made within four or five years after issue (R. 48). The certificates were not negotiable but were assignable by the growers (R. 46). The certificates were not secured, were inferior to the other obligations of the Cooperative (Exhibit 2, Article XIII, section 4,) and inferior even to the membership fund (R. 45). Six certificates were assigned in 1944 and thirteen in 1945, but the records of the Cooperative do not indicate the circumstances surrounding the transfer such as settlement of Estate, marital settlements, credit settlements, etc., nor he amount received by the grower for a transfer if on a sale (R. 46).

STATUTES AND REGULATIONS INVOLVED

The parts of the income tax law (sections 22(a) and 42(a), Internal Revenue Code, Title 26, United States Code), and the regulations promulgated thereunder, (Regulations 111; sections 29.22(a)-7 and 29.42-2) which are chiefly involved in this proceeding are copied hereunder for the convenience of the Court.

INTERNAL REVENUE CODE:

SEC. 22(a) GROSS INCOME: GENERAL DEFINITION

"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . . . .

SEC. 42(a) PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED

General Rule—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period . . . . . .

REGULATIONS: 111:

SEC. 29.22(a)-7 GROSS INCOME OF FARMERS

A farmer reporting on the basis of receipts and disbursements (in which no inventory to determine

profits is used) shall include in his gross income for the taxable year (1) the amount of cash or the value of merchandise or other property received during the taxable year from the sale of live stock and produce which were raised during the taxable year or prior years, (2) the profits from the sale of any live stock or other items which were purchased, and (3) gross income from all other surces . . . . . .

SEC. 29.42-2 INCOME NOT REDUCED TO POSSESSION

Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute a receipt.

POINTS ON WHICH THE PETITIONERS RELY

I. The findings in the opinion below were inconsisten with the stipulation of facts, which were the only facts of record.

II. The opinion below was contrary to the Internal Revenue Code and the Regulations promulgated thereunder, and was erroneously based on an inapplicable section of the Internal Revenue Code.

ARGUMENT

I. The findings in the opinion below were inconsistent with the stipulation of facts, which were the only facts of record.

Throughout the Tax Court's opinion, the Tax Court treats the relationship of the holders of Certificates of Indebtedness of the Cooperative as that of a member, contrary to Stipulation Paragraph 12 and Exhibit 4. Neither on the face nor reverse of Exhibit 4, the contract between the grower and the Cooperative, is mention made that the contract is between a member and the Cooperative, except as the contract serves as an application for membership pursuant to Paragraph 19 thereof. The contracts also were made with non-members (R. 47).

At (R. 25), the Tax Court states, "All other rights, interests, and participations were to be according to the patronage or participation of the member in the crop marketing program", implying participation in the conduct or management of the Cooperative, according to the proportions of Certificates of Indebtedness held by a grower. The only right of the

holder of a Certificate of Indebtedness is to redemption of the certificate if, as and when, in the sole discretion of the Board of Directors of the Cooperative, such redemption is advisable, with payment of interest accumulated at that time, and with the right to assign such Certificates. A non-member may hold such certificates, or a member may withdraw his membership without affecting his holding of a Certificate of Indebtedness.

The Tax Court (R. 37) states that the Certificates were, "nonetheless securities evidencing valuable rights or interest in the commercial reserve which belonged to the Caswells and which without restriction, other than that the transfers thereof be recorded on Turlock's books, could be sold, traded in, or assigned .....", well knowing the limitations of assignment by law, and ignoring the express provision of Section 4, Article XIII, of the By-Laws, as shown in Exhibet 2.

The Tax Court further (R. 38) indicates that such assignments were "usual and customary", for valuation purposes, because six certificates were transferred in 1944, and thirteen in the year 1945, contrary to Stipulation 10 (R. 46) that the records of the Cooperative do not show whether the transfers were voluntary sales, or estate or marital settlements, etc.

The Tax Court (R. 38) implies the payment of interest separately from principal, as would be expected for dividends on preferred stock. This is contrary to Exhibit 1, (R. 50) and Exhibit 2, Article XIII, Section 5.

The Tax Court further states (R. 38) that, "the record also indicates the practice on the part of Turlock of retiring or redeeming outstanding certificates at face before too many years had elapsed." The stiplated facts (R. 47) indicate that in 1941, part of the redemption of that year was for certificates issued four years previously, whereas up to November 13, 1950, there had been no redemption of the certificates issued after June 1, 1943, and no redemptions since 1948.

At (R. 39), it is held that the certificates had a value equal to their face value, which ignors the statement in the preceding paragraph of the opinion that the stipulation included the opinion of two local bankers that the certificates were not even marketable.

The Court found that the Cooperative balance sheet "gives every indication that the value back of the Certificates covered them at face", (R. 39), whereas the balance sheet, Exhibit 3, shows current liabilities of $337,634,64, plus $274,402.72, currently due growers from the current crop after allowance for Withhold, or a total of $612,037.36 compared to current assetss of $766,707.84 of which almost half, or $364,681.28 is in inventory which at best is subject to fast and wide fluctuations in value.

The Tax Court states (R. 39) that "Turlock was well-known in the community as being in sound condition and well-managed". By this statement the Tax Court accepts the opinion of Mr. Puccinelli, Exhibit 5, but in the previous paragraph of its decision

ignores the opinion of Mr. Puccinelli that the certificates were not marketable. Moreover, Mr. Puccinelli's opinion was stipulated to the effect that the cooperative "enjoys a magnificant reputation in the canning industry", which statement would have to be greatly enlarged to include the community or public at large, the means of establishing the market for the certificates.

II. The opinion below was contrary to the Internal Revenue Code and the Regulations promulgated thereunder, and was erroneously based on an inapplicable section of the Internal Revenue Code.

The Tax Court based its decision upon section 111 (b) of the Internal Revenue Code (R. 38). It is the contention of the petitioners that such section is for the purpose of determining gains or losses from the sale of capital assets, apparently recognized by this Court in its decision in Westover vs. Smith, 173 F(2) 90. Regulations 111, section 29.111-1, dealing with computation of gain or loss begins, "except as otherwise provided, the Internal Revenue Code regards as income or loss sustained ....." and the only examples cited therein indicate gains or losses from the sale of capital assets and not profits or amounts realized from disposition of crops, inventories, or stock-in-trade. It is petitioners' contention that such profits or realized income are "otherwise provided" for by sections 22(a) and 42(a) of the Internal Revenue Code, the pertinent parts of which

are reproduced herein for the convenience of the Court.

The Tax Court further implies (R. 36), but later denies (R. 37), that its decision is supported on the basis of constructive receipt by its decisions in the San Joaquin Valley Poultry Producers Association vs. Commissioner, 136 Fed (2d) 382, Colony Farms Cooperative Dairy, Inc., 17 TC 688, George Bradshaw, 14 TC 162, and Harbor Plywood Corporation, 14 TC 158. The Poultry Producers case, supra, concerned section 101 (12), Internal Revenue Code, determining the exemption of a cooperative and not the taxability of income to a grower. The Colony Farms case, supra, dealt with fixed and legal obligations of a cooperative and again was concerned with section 101 (12) of the Internal Revenue Code, determining the tax exempt status of the cooperative taxpayer. The Bradshaw and Harbor Plywood cases, supra, are distinguishable on the ground that there the taxpayers were on the accrual basis of accounting rather than on the cash basis.

The Tax Court (R. 37) discusses the conduit doctrine as applied in the Bradshaw cas just cited. It is your petitioners' contention that had Congress intended to treat cooperatives as partnerships, which is the inevitable result of the Commissioner's determination and the Tax Court's theory therein, this status could have been completely established by reference to sections 181-190 of the Internal Revenue Code which, as Supplement F, deals with partnerships.

The Tax Court throughout its opinion indicates that the amounts represented by the Certificates of Indebtedness were, in fact capital contributions. It is respectfully submitted that working capital can be secured as readily by indebtedness as by capital contribution. See John Kelley Company v. Comny, 326 US 521, and Talbot Mills v. Comm., 326 US 521. Petitioners further contend that the issuance of the Certificates of Indebtedness at least one year after title had passed to the Cooperative and pursuant to the agreement with the grower, accomplished nothing more than evidence the indebtedness of the Cooperative to the grower and was not a discharge of the indebtedness. Moreover, if the aliquot portion of the crop represented by the Certificates of Indebtedness is to be considered as a capital contribution, then your petitioners submit that there should be no recognizable gain or loss from such contribution as provided in section 112 (b) (5) of the Internal Revenue Code.

The effect of the treatment of the Tax Court of the Certificates of Indebtedness in the hands of your petitioners is to completely destroy the relief intended by Congress in section 101 (12), Internal Revenue Code, which legislatively was a relief provision for the benefit of cooperatives, and is to nullify its relief by shifting the burden of immediate tax from the cooperative to its members. There is nothing in the legislative history of that section to indicate that

Congress intended to draw a distinction between the treatment of members on the cash or accrual methods or between the treatment of disbursements of proceeds whether current or deferred. That section is completely silent on its application to the members, and the fiction of conduit, agency, or partnership status is administrative legislation.

Your petitioners contend that they are properly taxable under sections 22(a) and 42(a) of the Internal Revenue Code. Further, that there is no constructive receipt because not reduced to possession as required in section 29.42-2 Regulations 111, nor in section 29.42-3, Regulations 111 which states, "An amount credited to shareholders of a Building and Loan Association, when such credit passes without restriction to the shareholder, has a taxable status as income for the year of the credit. If the amount of such accumulation does not become available to the shareholder until the maturity of a share, the amount of any share in excess of the aggregate amount paid in by the shareholder is income for the year of the maturity of the share." J. D. Amend, 13 TC 178 (Acquiesced in by the Commissioner); Farmers Cooperative Company v. Birmingham, 86 Fed. (2d) 201; and Samuel K. Jacobs, 22 BTA 116. Petitioners further contend that the issuance of the Certificates of Indebtedness were not the equivalent of cash because they were evidence of a presently existing debt. In Schlemmer v. U. S., 94 F (2d) 77, Judge Lerned Hand said "The only actual testimony was that the note was not taken as payment of the

debt, but only as more permanent evidence of the debt. Indeed, it is not at all clear that it would have been a cash item, even if it had in fact been taken as payment. It did not change the substance of the debt—not being endorsed or secured—and although it was more readily disposable, that single incident was scarcely enough. There must be more than difference in the mere form of property to justify a charge of income." This case was cited to support 1T 3342, 1940-1 CB 58, wherein the Commissioner held that "the holders of notes will not be required to include the amounts thereof as income until such payments are received." In Joplin, 17 TC 1526, just after its decision in the instant case, the Tax Court found that cash basis taxpayers were taxable on issuance of authorized preferred stock, $25 par value, but not on amounts credited to the capital reserve account of the cooperative simply because there was no evidence issued of such credit, although the right to retain was similar to the cooperative here involved.

The petitioners here contend that the Certificate of Indebtedness does not fall within the definition of "other property" found in sub-paragraph 1 of the first paragraph of section 29.22(a)-7 because it is nothing more than an evidence of indebtedness, insecure at best; in fact, less secure than an open account which relies on the general credit of the cooperative.

The absence of a maturity date precludes any equivalence of cash. See Bedell v. Commissioner, 30 Fed

(2d) 622 where the Court said "it is absurd to speak of a promise to pay a sum in the future as having a 'market value', fair or unfair ..... ". In the case of Burnett v. Logan, 283 US 404, it was held that where the receipt of future payments is contingent and uncertain, no income may be realized in the year in which the sale or other disposition of the property takes place. Edward J. Hudson, 11 TC 1042, acquiesced in by the Commissioner, held that non-negotiable notes which were not unqualifiably payable in money or at a certain time were not equivalent of cash and not income to the taxpayer who was on a cash basis in the year that they were issued.

The immediaely preceding statements also support petitioners' contention that the Certificates of Indebtedness were without market value. To further this contention, petitioners respectfully submit that the Certificates were non-negotiable, were assignable only, were inferior to all claims against the Cooperative, conferred no rights of management nor participated nor benefitted from able management except as it might assure payment if, as and when that management deemed redemption desireable.

CONCLUSION

The Tax Court, in the present decision, indicates by its improper reliance on section 111(b) that it still cannot justify its action under the Internal Revenue Code, having previously tried the theories of constructive receipt, of equivalent of cash, and of a conduit, agency, or partnership. The Internal Revenue Code, and the Regulations promulgated thereunder, in sections 22(a) and 42(a) clearly set forth the rules for taxation, as contrasted with section 111 (b), relied on by the Tax Court, which deals with capital transactions.

Briefly stated, here we have:

1. A cash-basis taxpeyer
   a. Selling his produce to a buyer, a Cooperative,
   b. Of which he may or may not be a member,
   c. By an arms-length contract setting forth the terms of payment, partly by cash,
   d. Partly by a general obligation of the buyer

2. Which later is evidenced by a Certificate of Indebtedness,
   a. Certain as to amount,
   b. And, unlike capital stock, transferable only by assignment and not by negotiation,

4. With the balance sheet of the buyer indicating that the security of the certificates rests upon the full realization of an inventory of food products (highly speculative) constituting one-fourth of the

assets at the time of the issue as contrasted with almost three-fourths of the assets five years after issue.

5. The acceptance of these contingencies by the petitioners was in the expectation of ultimately realizing more from the sale of their products

6. With tax liability properly established upon such realization.

No. 13,523

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF WALLACE CASWELL, DECEASED; JENNIE J. CASWELL, ADMINISTRATRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

and

ESTATE OF CHARLES HENRY CASWELL, DECEASED; EARL W. CASWELL, ADMINISTRATOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
WILLIAM L. NORTON, JR.,
Special Assistants to the Attorney General.

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In the United States Court of Appeals for the Ninth Circuit

No. 13,523

ESTATE OF WALLACE CASWELL, DECEASED; JENNIE J. CASWELL, ADMINISTRATRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

and

ESTATE OF CHARLES HENRY CASWELL, DECEASED; EARL W. CASWELL, ADMINISTRATOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 20-39) is reported at 17 T.C. 1190.

JURISDICTION

These petitions[1] for review (R. 60-65) involve deficiencies in federal income taxes for 1945 of $7,828.97

[1] On motion of the taxpayers these cases have been consolidated for briefing and hearing. Since the issues are the same in both cases, only the record in Estate of Wallace Caswell has been printed. (R. 69-71.)

in the Estate of Wallace Caswell (R. 40) and of $5,278.10 for the year 1945 for the Estate of Charles Henry Caswell (R. 41). On December 5, 1949, the Commissioner mailed to the taxpayers notices of deficiency. (R. 9-16). Within 90 days thereafter and on February 27, 1950, the taxpayers filed petitions with the Tax Court for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code. (R. 5-16.) The decisions of the Tax Court sustaining the deficiencies were entered May 5, 1952. (R. 40-41.) The cases are brought to this Court by petitions for review filed August 4, 1952 (R. 60-65), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court erred in holding that the transferable interest-bearing certificates issued to taxpayer-members of a co-operative growers association representing their interest in the capital reserve of the association constituted income to the taxpayer-recipients to the extent of the face value of the certificates.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations involved are set forth in the Appendix, *infra.*

STATEMENT

In the Tax Court the facts were stipulated and were found as stipulated. (R. 22.) The facts as appearing in the Tax Court's opinion (R. 20-39) may be summarized as follows:

Wallace Caswell, until his death on December 3, 1949, and for the years material hereto, was a resident of

Ceres, California. He filed his income tax return for the taxable year 1945 with the Collector of Internal Revenue for the First District of California. After his death, his wife, Jennie J. Caswell, was duly appointed and qualified as administratrix for her husband's estate. In the year 1945, Wallace Caswell filed his return on a cash receipts and disbursements basis and reported all income as the community income of himself and wife, to whom he was married at all times material hereto. (R. 22.)

Charles Henry Caswell, until his death on June 26, 1949, and for the years material hereto, was a resident of Ceres, California. He filed his income tax return for the taxable year 1945 with the Collector of Internal Revenue for the First District of California. After his death, Earl W. Caswell was duly appointed and qualified as administrator of the estate of Charles Henry Caswell, deceased. In the year 1945, Charles Henry Caswell filed his return on the cash receipts and disbursements basis and reported all income as community income of himself and wife, Helen C. Caswell, to whom he was married at all times material hereto. (R. 22.)

Wallace and Charles Henry Caswell each had a one-half interest in the partnership, Caswell Brothers, of Ceres, California. This partnership was engaged in growing peaches which it marketed through the Turlock Co-operative Growers Association of which it was a member. (R. 22-23.)

The Turlock Co-operative Growers Association, sometimes referred to herein as the Co-op, or Turlock, is a California farmers' co-operative marketing association located at Modesto, California. During 1945,

and so far as appears during all other years, Turlock was exempt from income tax under Section 101 of the Internal Revenue Code. (R. 23.)

The Co-op conducted business with its members pursuant to a crop contract. The contract in form was a contract of purchase. It covered all of the crop or crops to be produced for designated years on specified land. "Terms and Condition" 4, 5 and 6 were as follows (R. 23-24):

> 4. The association shall pool the commodities of the Grower with commodities of like kind, grade and classification purchased by the Association under contracts similar to this, and the price to be paid to the Grower therefor shall be based on the average price per pound at which all commodities of like kind, grade and classification shall have been sold by the Association.
>
> 5. The Association, if market and financial conditions in its judgment justify, may make advances on account of payment on the commodities purchased by it hereunder, the amount of such advances being based on market and financial conditions and the quality of the commodities.
>
> 6. The Association agrees to sell said commodities in bulk in its natural state as delivered, or at its option, to can, preserve, manufacture, process and pack said commodities, or to procure the same to be done, and thereafter sell the same as rapidly as possible and pay the proceeds over to the Grower, named in this and similar contracts, first deducting any advances made the Grower, and each Grower's pro rata share of the cost of receiving, handling, manufacturing, canning, storing, selling, advertising, and other expenses of the Association,

and an Association charge, to and in such an amount as shall be determined by the Board of Directors of the Association. From this Association charge, organization and other general Association expenses shall be deducted, and with the balance a commercial reserve shall be created.

Whenever any commercial reserve is no longer needed for Association purposes, the Association shall distribute it among the Growers in the proportions to which they are entitled, determined on the basis of the amount retained from each Grower to create such a reserve.

By Section 3 of Article XII of Turlock's by-laws it was provided that a non-assignable certificate of membership should be issued to each member who has signed a marketing agreement in the required form. By Section 5 it was provided that each member should have one vote. A membership fee of $10 was payable under Section 8 and the fees so paid were to be retained as a membership fund in cash or in specified assets and by Section 6 it was provided that the property rights and interest of the members in the membership fund so established should be equal, each member having "one unit of property right and interest." All other rights, interests and participations were to be according to the patronage or participation of the member in the crop marketing program. (R. 24-25.)

The association charge which under provision 6 of the crop contract was to be deducted by the Co-op when making payment to the member for his crop was covered by Section 9 of Article XII of the by-laws and reads as follows (R. 25):

From the Association charge provided for in the marketing agreement, organization and other gen-

eral association expenses shall be deducted and commercial reserves created, and deductions made for the interest on or retirement of the advance fund in the discretion of the Association.

During the taxable year and up to March 8, 1949, the provision of the by-laws covering the creation and maintenance of the commercial reserve also dealt with in provision 6 of the marketing contract was as follows (R. 25-26):

> The association shall create and maintain a commercial reserve. This reserve shall be deducted from the Association charge and shall be used to purchase necessary equipment and property, to provide working capital and for other uses of the Association, including the purchase of stock of any corporation organized for the purpose among other things of manufacturing or selling the products of this Association, and with whom this Association shall contract for the manufacturing of such products.
>
> Certificates shall be issued bearing interest at the rate of six per cent per annum for and on account of the respective interest herein of the members of the Association. If the members do not elect to continue co-operative marketing to the end of the period provided in the marketing agreement, the directors shall sell the assets of the Association, and after deducting and retaining the entire membership fund for distribution equal to memberships, shall distribute the proceeds proportionately to the owners of the certificates then unredeemed.

During 1945, Turlock issued to the partnership, Caswell Brothers, two certificates "for and on account of"

its interest in the Commercial Reserve Fund. Certificate 1110 in the amount of $2,731.86 was issued February 1, 1945, and was for the 1943 crop. Certificate 1229 in the amount of $4,389.92 was for the 1944 crop. Up to the date of the trial herein neither certificate had been redeemed. (R. 26.) The certificates bore interest at 6 percent per annum and in form were as follows (R. 27-28):

Incorporated March 2, 1929

Turlock Co-operative Growers

An Incorporated Co-operative Association
Organized Under the Laws of the
State of California.

This Certifies That —— is the owner of —— Dollars of the Commercial Reserve Fund of the

Turlock Co-operative Growers

Said Commercial Reserve Fund and the interest therein represented by this

Commercial Reserve Fund Certificate

is subject to the provisions of the Articles of Incorporation and Bylaws of this Association and shall be distributed only in accordance with the provisions thereof.

Interest at the rate of —— per annum shall be paid upon the face value represented by this certificate from date first issued, until called for redemption.

This certificate is transferable upon the books of the Association by the owner or by duly author-

ized agent upon surrender of this certificate properly endorsed.

Series ——.

Date first issued ——.

Witness the seal of the Association and the signatures of its duly authorized officers.

Date ——.

—— ——,
President.

—— ——,
Secretary-Treasurer.

Wallace Caswell, as an individual, was also a member of Turlock, and during 1945 three certificates were issued to him reflecting his interest in the Commercial Reserve Fund. Certificate 1111 in the amount of $140.38 and Certificate 1112 in the amount of $789.72 were issued on February 1, 1945, and were for the 1943 crop. Certificate 1230 in the amount of $1,418.82 was issued on November 1, 1945, and was for the 1944 crop. Up to the date of the trial herein none of these certificates had been redeemed. These certificates bore 6 percent interest per annum and were in the form set out above. (R. 28.)

The Co-op operates on the basis of a fiscal year ending January 31. (R. 28.) Its balance sheet as of January 31, 1946, appears in the Record (pp. 29-31).

Turlock renders a financial statement to each of its members at the end of each of its fiscal years but the statement given to members is not broken down into details to the extent shown in its balance sheet. (R. 32.)

During a crop year but before harvesting, the Co-op makes advances to its members. When the crop is har-

vested and delivered to it, the Co-op pays its members in cash as it in turn sells the crop or goods canned from the crop, after deducting for the advances made, less a percentage, usually at 10 percent, which is withheld by the Co-op and which ultimately is represented by the issuance of certificates. Upon receipt by the Co-op, the crop produced by a member is mixed with similar crops produced by other members and becomes part of one of the pools for that year. As these pools are liquidated by the Co-op, the above-mentioned payments are made. After a pool is liquidated to the extent of 90 percent or 95 percent, the pool is closed and certificates are issued for the amounts withheld plus an estimated 10 percent of the sales price on the remaining 5 percent or 10 percent of the pool unsold at the time of closing. This unsold portion of the pool is carried over to following years and sold without burden of any further expense, the actual expenses of sale being carried entirely by the current year pools. (R. 32.)

At the conclusion of the distribution of each commodity pool, a statement is rendered to each of the growers showing the total amount received for the commodity marketed, less any charges that might have been made to him, also less the Reserve Fund Certificate which up to this time had been issued on the basis of 10 percent of the net return of the commodity marketed. (R. 32-33.)

The Co-op, from time to time, purchases certain quantities of raw materials from non-members in order to complete pack orders with respect to certain commodities, but the quantities so purchased are small in comparison to the materials supplied by the grower members. (R. 33.)

If the financial condition of the Co-op is such that the board of directors concludes that a redemption can be made of outstanding certificates, a call is made for the oldest outstanding certificates. Prior to the amendment of Article XIII of the association's by-laws in 1949, certificates were issued and redeemed on the basis of their individual dates of issuance; the amendment requires that they now be issued and redeemed in yearly series. For all times material hereto, the Co-op has paid those certificates which it redeemed on the basis of 100 cents on the dollar. In 1941 the Co-op redeemed the certificates which it issued in 1935 and 1936, and a portion of those issued in 1937. In 1943 it redeemed the remainder of the certificates issued in 1937 and also those issued in 1938 and a portion of those issued in 1939. In 1944 it redeemed the remainder of the certificates issued in 1939 and all of those issued in 1940. In 1945 no certificates were redeemed. In 1946 the Co-op redeemed the certificates issued during the first eight months of 1941. In 1947 it redeemed the remainder of the certificates issued in 1941 and all of those issued in 1942. In 1948 it redeemed certificates issued during the first five months of 1943. No certificates have been redeemed since 1948. (R. 33-34.)

According to the books of Turlock six transfers of certificates were made in 1944 and thirteen in 1945. The circumstances, reasons or considerations for these transfers are not shown of record and do not appear on the books of the Co-op. (R. 34.)

Interest rates on the certificates are now fixed by the board of directors of the Co-op. Certificates issued currently carry interest at 3 percent, whereas earlier certificates, including those for the year 1945, carried an interest rate of 6 percent. (R. 34.)

In his determination of the deficiencies herein the Commissioner included in gross income the face amount of the certificates issued in the taxable year. In his notices of deficiency the amounts so included in gross income were shown as representing the fair market value of the certificates. (R. 35.)

SUMMARY OF ARGUMENT

I

The certificates issued by the Co-op to the taxpayer-patrons in part payment for the crop sold by the Co-op was not an evidence of indebtedness as contended by taxpayers, but represents taxpayers' interest in the incorporated Co-op. For taxpayers' crop during the taxable year in question, the taxpayers were paid, pursuant to their agreement with the Co-op, partly in cash and partly in Co-op certificates representing taxpayers' pro rata share in the revolving capitalization fund maintained by the Co-op. The certificates bore interest at the rate of 6 percent which has always been paid, were transferable and several transfers have been recorded. The reputation and condition of the Co-op and management are good. The surplus retained in the Co-op's revolving fund equals the face amount of the outstanding certificates. The oldest outstanding certificates were being redeemed by the Co-op at face value without undue delay. It is evident therefore that the certificates evidenced taxpayers' equity in the Co-op.

In reality the certificates in the absence of evidence to the contrary are as a matter of law equal to face, the value to the Co-op and to the taxpayers being the same. But if the value of the certificates is a fact question as

treated by the Tax Court the decision, moreover, is correct since on these facts the certificates had a fair market value of face. Definitely the taxpayers by receipt of the certificates received and realized income in "property (other than money)" pursuant to the provisions of Section 111 (b) of the Internal Revenue Code. Moreover, the evidence substantiates the Commissioner's determination that the "property" received, the certificates, had a fair market value of face.

ARGUMENT

The Tax Court Did Not Err in Holding that Charles and Wallace Caswell Realized Income in 1945 upon Receipt of the Certificate Issued by the Turlock Co-operative Growers

A. *Preliminary*

Wallace Caswell and Charles Henry Caswell (herein referred to as the taxpayers), both of whom are now deceased, were residents of Ceres, California. Both were engaged in farming operations, each operating a separate farm, and also operating certain farming property as a partnership under the name of Caswell Brothers. They filed their income tax returns for 1945 on a cash receipts and disbursements basis. (R. 22.) Wallace Caswell as an individual and the partnership, Caswell Brothers, both were members of a farmers' co-operative known as Turlock Co-operative Growers, and they marketed peaches through that organization. In 1945, the partnership received two certificates of the Turlock Co-operative Growers in the amounts of $2,731.86 and $4,389.92 which were issued respectively on the 1943 and 1944 crops of peaches supplied by the partnership. In 1945, there were issued to Wallace Caswell individually two certificates in the amounts

of $140.38 and $789.72 on his 1943 crops of peaches, and one certificate in the amount of $1,418.82 on his 1944 crop. All of these certificates called for interest at the rate of 6 percent and were transferable. (R. 26, 28, 50.) The Commissioner determined, and the Tax Court held, that these certificates were includible in their 1945 income at the face value.

B. *The certificates represented the amount of the taxpayers' interest in the co-operative association*

Contrary to the argument of the taxpayers (Br. 7-10), the Commissioner contends that the findings of the Tax Court were consistent and in harmony with the facts as stipulated. It is meaningless to argue with the taxpayers concerning the rights of the holders of the certificates, whatever be the legal significance of the certificate. The question is whether, at the time of issue and receipt of the certificates, the taxpayers received taxable income.

The taxpayers argue that these certificates are not income to them because the certificates represent a debt owed them by the Co-op. (Br. 12, 13, 14.) But the Tax Court held that it made no difference "Whether the certificates received be likened to debentures or evidences of indebtedness or to shares of preferred stock or be said to evidence a more direct ownership of the designated amount of the commercial reserve," because "they were none the less securities evidencing valuable rights or interest in the commercial reserve which belonged to the Caswells * * *." (R. 37-38.) Taxpayers' authority (I. T. 3342, 1940-1 Cum. Bull. 58) for the argument (Br. 13-14) that notes need not be included in the holder's income until paid is meaningless

since in that I. T. the "notes" were given in lieu of interest payments on debentures and were mere extensions of debenture interest payments, and, further, they had no fair market value.

The position of the Commissioner is that instead of being "certificates of indebtedness" as contended by the taxpayers, these certificates represent the taxpayers' equity in the Commercial Reserve Fund maintained by the Co-op, and are certificates of ownership in the nature of a callable preferred stock issued by a corporation. The face of the certificate makes it plain that it is issued by a corporation, that it contains no promise to pay, that it is a certificate of ownership, subject to be freely sold, exchanged, transferred or assigned, that it may be called for redemption by the corporation, and there is no promise that the face amount of the certificate will be paid. Although the certificate is worded in terms of ownership of the Commercial Reserve Fund of the Turlock Co-operative Growers, an examination of the balance sheet (R. 29-31) makes it clear that there is no "fund" in the sense of the accumulation of cash, but rather the certificates represent the owner's equity in the business. The balance sheet shows that the total of the assets at the end of the fiscal year ending January 31, 1946, was $1,317,636.61, and this exceeded the total liabilities by $570,599.25. This latter figure which represented the total of the equity of the members in the business, was derived from the membership fees in the amount of only $760, and amounts retained from 1945 and prior pools in the amount of $569,839.25. Thus it is clear that the substantial amounts retained in the pools (rather than the meager membership fees) in exchange for and

upon which the certificates were issued, provided the corporation with the capital on which it operated. Approximately the same condition is shown by the 1949 and 1950 balance sheets. (R. 59-60.) Indeed, Article XIII of the Co-operative corporation's by-laws as in effect in 1945 made it clear that the reserve was not maintained as a cash fund by specifically stating that it was to be used to "purchase necessary equipment and property" and "to provide working capital." (R. 26, 44.) In all respects but name, these certificates have all the characteristics of a callable preferred stock. Certainly the holder was the owner of an interest in a corporation and was not a creditor on an indebtedness due by it. There is absolutely no indication in the by-laws or contracts between the parties that these certificates were to be considered as evidence of indebtedness.

The Commercial Reserve Fund represents operating capital to this Co-op. This revolving fund method of financing is a means of maintaining adequate Co-op capitalization. When the taxpayers' rightful net proceeds for the year's crops were credited by the Co-op to its revolving capitalization fund and certificates issued, the taxpayers' legal position became that of an investor. In the final analysis, it matters not what name is given the certificates. As stated in Rumble, Cooperatives and Income Taxes, 13 Law and Contemporary Problems (1948), p. 546:

> If the contract liability theory be applied and distributions in securities or to capital reserves be considered payment of the liability and a capital reinvestment by the patron, or if either the agency or fiduciary theory be applied, patronage refunds distributed to patrons on the basis of their business

with the cooperative, excluding earnings on the business of nonparticipating patrons, are not income of the cooperative within the meaning of the constitutional provision and cannot either be made such by constitutional fiat or be taxed as such by Congress.

If the certificate is evidence of the contributors' donating interest in the fund similar to an owner's interest in a corporation such as shareholders have, then certainly the amount of the patron's interest retained by the Co-op was income to the patron-contributor prior to or at the time of issuance of the certificate.

The Tax Court held that the actual receipt of the securities by the taxpayers represented taxpayers' interests in the Co-op (in the face amount) and constituted receipt of income to them on the cash basis in the face amount of the certificate. ~~The taxpayers received the certificates in the same year that the Co-op sold~~ the crops.

The taxpayers chose to market their crops in such a manner that, instead of receiving the entire purchase price in cash, they received part of it in cash and part in transferable interest-bearing certificates representing an equity in the Co-op corporation. It is well settled that a taxpayer cannot defer the realization of income merely by receiving a portion of his sales price in property.

The Tax Court found, based on the provisions of Section 111 (b) of the Internal Revenue Code [2] and Sec-

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[2] Section 111 (b) of the Internal Revenue Code provides:

The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

tion 29.22(a)-7 of Regulations 111[3] (both Appendix, *infra*), that the acquisition of the certificates represented a taxable gain to taxpayers in "property (other than money)" to the extent of the fair market value of the certificates and that the facts required a conclusion that the fair market value of the certificates amounted to face. The court considered the value of the certificates to be a question of fact. On this theory it is obvious that the certificates are property other than money, and accordingly are includible in the income of these cash basis taxpayers in the year in which they were received to the extent of their then fair market value. See *Brown* v. *Commissioner,* 69 F. 2d 863 (C.A. 5th), certiorari denied, 293 U.S. 579, wherein taxpayer sold timber for some cash and co-op stock, and it was held that the value of the co-op stock was includible in her income in the year it was received. See also Income Tax Information Release No. 2, April 13, 1950 (1950 C.C.H., par. 6111), wherein it is held that distributions of this type by farmers' co-operative marketing associations should be included in the gross income of the patrons to the same extent that such distributions would be includible if paid in cash.

It is accepted practice for farmers on the cash basis to expense the entire cost of raising their crops in the taxable year in which the crops were grown, so that any proceeds from a sale, whether in cash or property, constitute income to the full extent thereof, and are

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[3] Section 29.22(a)-7 of Regulations 111 provides:

> A farmer reporting on the basis of receipts and disbursements (in which no inventory to determine profits is used) shall include in his gross income for the taxable year (1) the amount of cash or the value of merchandise or other property received during the taxable year from the sale of live stock and produce which were raised during the taxable year or prior years, * * *.

not a mere reimbursement for the cost of producing such crops.

It is submitted that if it can be shown that the certificates or other property received in lieu of cash has *any* value, *a fortiori,* it must constitute income to the recipient. Regulations 111, Section 29.111-1 (Appendix, *infra*) states that "only in rare and extraordinary cases" will such property be considered to have no fair market value, and "The fair market value of property is a question of fact." Where the certificates have some recognized value, whether they be notes, stock or otherwise, but the market value is not established or is speculative or is not subject to proof, the fair market value must be presumed to be face. See *Estate of Pratt* v. *Commissioner,* 7 B. T. A. 621, 624-625, and *Ballard* v. *Commissioner,* 25 B.T.A. 591, where the Commissioner's determination of value was approved in the absence of evidence. The denominational amount of the certificates at the time of issue is determined by the Co-op and patron pursuant to the actual market value of the crops sold by the Co-op. The "cost" of the certificates to the taxpayers was the equivalent of the peaches sold by the Co-op. Here the taxpayers did not show that the certificates had no fair market value, or that the certificates had a value less than face. On the contrary, the facts show that some market value must be attributed to the certificates.

Herein the record gives no indication that the fair market value of the certificates was less than face. The burden was clearly on the taxpayers to show that the certificate had no value or value other than face. To establish that value, evidence of book value is sufficient to establish a *prima facie* case which will become con-

clusive if contrary evidence is not introduced. *Keck Inv. Co.* v. *Commissioner,* 77 F. 2d 244 (C.A. 9th), certiorari denied, 296 U.S. 633. In addition, in the Tax Court the taxpayers must overcome the presumption arising in favor of the Commissioner's determination that the value of the certificate is face. Here the Commissioner's presumption was not overcome. The balance sheet of the Co-op shows that the assets behind the certificates covered them at face. The 6 percent interest provided on the certificates was very attractive and there was no indication that the Co-op had ever defaulted on any interest payments. The record shows that the Co-op periodically redeemed the oldest outstanding certificates without delay. (R. 33-34.) The Co-op was known in the community to be in sound financial condition and well-managed and from the transfers of certificates reported on the Co-op's books in 1944 and 1945 (R. 34), it seems apparent that such certificates had a market value. Furthermore, it does not appear that these certificates were transferred at less than face value. Therefore, it seems clear that the Tax Court's decision on this point is not unreasonable, but is based on substantial evidence. *Mistrot* v. *Commissioner,* 84 F. 2d 545 (C.A. 5th).

We submit that the Tax Court did not err in this finding and that the ultimate decision is correct.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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ELLIS N. SLACK,
A. F. PRESCOTT,
WILLIAM L. NORTON, JR.,
Special Assistants to the Attorney General.

MARCH, 1953.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 42. [As amended by Sec. 114, Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 42.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

* * * * *

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * * *

(26 U.S.C. 1946 ed., Sec. 111.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(a)-7. *Gross Income of Farmers.*—A farmer reporting on the basis of receipts and disbursements (in which no inventory to determine profits is used) shall include in his gross income for the taxable year (1) the amount of cash or the value of merchandise or other property received during the taxable year from the sale of live stock and produce which were raised during the taxable year or prior years, (2) the profits from the sale of any live stock or other items which were purchased, and (3) gross income from all other sources. * * *

* * * * *

SEC. 29.111-1. *Computation of Gain or Loss.*—Except as otherwise provided, the Internal Revenue Code regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value

of any property which is received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will property be considered to have no fair market value. * * *

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No. 13523

United States
Court of Appeals
for the Ninth District

ESTATE OF WALLACE CASWELL, Deceased; JENNIE J. CASWELL, Administratrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

and

ESTATE OF CHARLES HENRY CASWELL, Deceased; EARL W. CASWELL, Administrator,

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vs.

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Reply Brief of Petitioners

ON PETITION TO REVIEW DECISIONS
of the Tax Court of the United States

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Attorney for the Petitioners

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Attorney for the Petitioners

PRELIMINARY STATEMENT

The petitioners filed their brief in these petitions for review on the 16th day of February, 1953, and the brief for respondent was received by the petitioners' attorney on March 24, 1953. This Reply Brief is, therefore, due to be filed on or before April 3, 1953.

ARGUMENT

It is to be noted that the statement of facts by the respondent (his brief—pages 2-11) is that reported by the Tax Court, which your petitioners have heretofore pointed out as being inconsistent with the stipulation of facts, the only facts of record. On the following, the petitioners and the respondent apparently are in agreement:

That the crop was sold pursuant to a contract, whether with a member or non-member at the time of execution;

That title passed at time of such execution;

That upon harvesting of the crop and delivery to the Cooperative, the grower was paid partly in cash, after credits for previous advances whether as a member or not; and,

That the following year or later, the certificate, which was non-negotiable, was issued to the grower pursuant to the contract and representing his eventual claim upon or possible recovery from the Cooperative for the balance still due under the original contract.

Respondent insists that in effect, the amount shown on the certificate is a capital or equity contribution. Petitioners do not believe that respondent will deny that from the date of delivery of the crop until the issuance of the certificates, the Cooperative is obligated to the grower in one form or another, as shown on their balance sheets as "currently due growers," and that a year or more subsequent to the "purchase" of the crop, the certificate is issued in the amount of the obligation. Petitioners contend that however you label it, the certificate is in exchange or acknowledgement of that indebtedness, with the transfer of that liability to the commercial reserve account. If determined to be a capital contribution, then pursuant to Section 112(b) (5) such exchange is non-taxable to all growers receiving such certificates, whether the exchange be determined an exchange of the unpaid portion of the crop, or of the indebtedness, for the equity in the Cooperative.

The respondent (his brief—page 11) emphasizes that the "surplus retained in the Co-op's revolving fund equals the face amount of the outstanding certificates." It is rudimentary accounting that the debits must equal the credits whether those credits are shown erroneously in the equity account or in the loans payable account. The true measure of the value is not that the books balance, but that the realizable value of the assets is equal to the amount of the liabilities. It is to be noted that in the balance sheet of January 1, 1946, there are liabilities of $472,634.64 due others than growers, and $844,241.97,

exclusive of membership fees, due the growers. Ultimately, the security of this amount is dependent upon realizing full value from inventory. Contrary to respondent's statement (his brief—page 15) that the "same conditions are shown by the 1949 and 1950 balance sheets" as for January 31, 1946, the liability to growers was 64% of the total liabilities on January 31, 1946, but the indebtedness of the Cooperative to others had so increased that on January 31, 1950, the percentage of liability to the growers had dropped to 37%; conversely, on January 31, 1946 13.2 percent of the assets were represented by canned goods inventory and this percentage had increased to 68.4 percent on January 31, 1950.

That canned foodstuffs are highly speculative in value is unquestionable. Respondent admits (his brief—page 15) that there was no fund back of the certificates, and that the petitioners had no assurance they would be paid (his brief—page 14). It is stipulated that the Certificates are inferior to all obligations of the Cooperative (Sec. 5, Art. XIII, By-laws).

Respondent's reference to Rumble, Cooperatives and Income Taxes, 13 Law and Contemporary Problems (1948) (his brief—page 15) merely raised the issue now before this Court, does not attempt to answer the question raised, and is in reference to taxability of the cooperative, not the member.

The respondent states (his brief—page 16) that the "Tax Court found, based on the provisions of Section 111(b) of the Internal Revenue Code and

Section 29.22-7 of Regulations 111 . . . "Petitioners submit that nowhere in the opinion or decision does the Tax Court mention section 22 of the Internal Revenue Code or Regulations, to which section the petitioners contend the Tax Court should have addressed itself, and under which petitioners would not be taxable. In fact, the Tax Court (R-37) bluntly rejected section 22(a) on the issue of constructive receipt.

The respondent, in reference to *Brown v. Commissioner, 69 F2d 863,* (his brief—page 17) states incorrectly that the case involved co-op stock, whereas in fact it concerned "her (the taxpayer's) part of the accumulated profits of the (timber) corporation represented in the redistribution of its stock."

The respondent (his brief—page 17) refers to the Income Tax Information Release No. 2, April 13, 1950, the validity of which is here at issue.

The respondent comments upon cash basis farmers expensing their crops in the year of growth, and that "any proceeds from a sale, whether in cash or property, constitute income . . . ", (his brief—page 17). This is true of any cash basis taxpayer. But, here, what did the farmer receive for that year's crop other than cash and an obligation (not the Certificate) from the Co-op for the balance?

Respondent takes issue with petitioners in their reference to I. T. 3342, 1940-1 CB58 (his brief—page 13), on the ground that it concerned notes for interest payments. The official heading of the I.T. 3342, is "Ownership certificates for bond interest",

(underscoring supplied) and is authority for the holding that such certificates were not taxable until redeemed.

It is to be noted that all the cases cited by the respondent concern the sale or exchange of capital assets and not the sale of crops, inventory, or stock-in-trade. It is further noteworthy that the respondent attempts to justify the Tax Court opinion and decision on the basis of Section 22, Internal Revenue Code, although the Tax Court assiduously avoided reference to such Section. The reason is simple, because the Tax Court's reliance on Section 111(b) was improper, and only by applying the rules of that Section to Section 22 of the Internal Revenue Code could the decision be justified. But, the petitioners could not have been taxed during the year of issue of the certificates under Section 22 because there was no actual or constructive receipt, the equivalent of cash, or the accrual basis. The very keystone of income tax law is that income is taxable when accrued or realized, and to be realized the decisions have consistently required reduction to possession, control, or command as set forth in Section 29.42-2, Regulations 111.

Petitioners reiterate that the theory of taxation here advanced by the Commissioner and approved by the Tax Court would completely subvert the intent of Congress in its relief provisions for Cooperatives, Section 101(12), Internal Revenue Code, by turning a Cooperative into a partnership. While we are not

concerned with what Congress might have done, we can hardly ascribe futility to their actions.

CONCLUSION

Inasmuch as the only facts of record were stipulated, petitioners submit that this Court is not bound by the erroneous findings of fact by the Tax Court. Actually, the issue is whether this Court will approve an administrative rule, Income Tax Information Release No. 2, supra, in contravention of generally accepted principles of taxable income, with a conclusive inference that certificates issued in pursuance thereof, are taxable upon issuance at their face amount. Petitioners respectfully submit that such a ruling thwarts the intent of Congress, and is contrary to our heretofore accepted concepts of taxable income set forth by statute, regulations and court decisions.

The decision of the Tax Court should be reversed on their erroneous findings of fact, in reference both to the realization of income by the petitioners at the time of issuance of the certificates, and as to the fair market value of those certificates, if their issuance is deemed to result in taxable income.

Respectfully,

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